

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

**STEPHEN FOSTER, MICHAEL GOMES,  
PETER KYRIAKIDES, RICHARD  
O'ROURKE, STEVEN PALLADINO,  
MARK SANTOS, DAVID SIBINICH,  
MICHELLE TOURIGNY, MICHAEL  
WHITE, FREDERICK YEOMANS, and  
HENDRICK DAVIS**, individually and on  
behalf of all others similarly situated,

Plaintiffs-Petitioners,

v.

**CAROL MICI**, Commissioner of the  
Massachusetts Department of Correction,  
**GLORIANN MORONEY**, Chair,  
Massachusetts Parole Board, and **THOMAS  
TURCO**, Secretary of the Executive Office of  
Public Safety and Security,

Defendants-Respondents.

Plaintiffs-Petitioners' Application for Direct Appellate Review by the Supreme Judicial  
Court

Dated: April 22, 2021

Elizabeth D. Matos (BBO #671505)  
James R. Pingeon (BBO #541852)  
Bonita P. Tenneriello (BBO #662132)  
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*Counsel for Plaintiffs*

The Plaintiffs-Petitioners (“Plaintiffs”) hereby apply for direct appellate review by the Supreme Judicial Court (“SJC”) pursuant to Rule 11 of the Massachusetts Rules of Appellate Procedure.

### **Statement of Prior Proceedings in the Case**

On April 17, 2020, Plaintiffs filed suit in the Supreme Judicial Court for Suffolk County under G.L. 214. § 1 seeking class-wide emergency relief from the failure of Defendants-Respondents (“Defendants”) to take necessary action to safeguard the health and safety of those incarcerated in Massachusetts during the COVID-19 crisis in violation of the Massachusetts Declaration of Rights and U.S. Constitution. On April 20, 2020, the Single Justice reserved and reported the case to the full SJC and simultaneously referred the matter to the Superior Court for expedited fact finding. On May 1, 2020, the Superior Court issued its finding of facts after receiving evidentiary submissions and holding several days of testimony. On June 2, 2020, the SJC denied Plaintiffs’ motion for preliminary injunction and transferred the case to the Superior Court to proceed as an emergency matter. On November 12, 2020, the Superior Court certified a class of all Massachusetts prisoners confined at Department of Correction (“DOC”) facilities (but not at county jails), and a subclass of all such

prisoners who according to guidelines from the Centers for Disease Control and Prevention (“CDC”) are at increased risk from COVID-19 due to their age (age 50 and older) and/or underlying medical conditions.

During a deadly outbreak of COVID-19 infections in DOC facilities in the fall and winter, Plaintiffs filed a second motion for a preliminary injunction on December 23, 2020, asserting that Defendants’ attempts to mitigate the risk of COVID-19 had failed and that their continued refusal to pursue depopulation constituted deliberate indifference to a substantial risk of serious harm, in violation of the Eighth Amendment. On December 28, 2020, while the motion for preliminary injunction was pending, the Legislature passed a new budget line item requiring the Commissioner of Correction to “release, transition to home confinement or furlough individuals in the care and custody of the department who can be safely released, transitioned to home confinement or furloughed with prioritization given to populations most vulnerable to serious medical outcomes associated with COVID-19[.]” which Plaintiffs raised in their subsequent briefing. On February 17, 2021, the Superior Court denied the motion.<sup>1</sup> On March 25, 2021, Plaintiffs sought review of the denial by a

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<sup>1</sup> In the order, the Superior Court invited Plaintiffs to move on an expedited basis for leave to amend the complaint to assert new claims under the

Single Justice of the Appeals Court pursuant to G.L. c. 231, § 118, first paragraph. On April 2, 2021, the Single Justice reserved and reported the petition to a panel of the Appeals Court. Plaintiffs now seek direct appellate review by the SJC.

### **Facts Relevant to the Appeal**

DOC prisoners suffered a first wave of COVID-19 infection in the spring of 2020 that sickened some 400 people in custody and killed 8. A second wave from the fall through winter was even more widespread and deadly, with over 2,600 more infected, at least 14 more incarcerated people dead, and an unknown number hospitalized with severe complications and long-lasting effects from the disease. The infection-control measures that DOC has implemented – testing, mask-wearing, quarantine, sanitation, and cancelling visitation – failed to prevent this terrible toll. Yet DOC has failed to take any meaningful steps to address its most critically important need: providing greater opportunity for social distancing.

Since last spring, the DOC's population has declined somewhat, due primarily to a drop in the number of admissions. Yet rather than spread prisoners out and reduce density, the DOC closed two minimum-security budget line item. On March 29, 2021, the Superior Court granted a motion to amend to add a new claim for declaratory judgment that the Commissioner of Correction is not complying with the line item.

prisons, creating *more* density elsewhere. Roughly half of all prisoners are still housed in a cell with one or more others; the number housed in a room with three or more has actually increased. Five prisons still hold more prisoners than their design capacity permits. Unsurprisingly, the most densely occupied prisons have been the site of the largest outbreaks. Prisoners continue to live in dormitories housing 40 to 80 people, and they are forced into close contact in crowded lines for medication and meals and busy common spaces.

As the toll of death and disease mounted, DOC never used home confinement to reduce its population. As a department-wide lockdown shuttered rehabilitative programs through which people could earn 15 days of “good time” sentence reduction credits per month, see G.L. c. 127, § 129D, DOC failed to ensure other opportunities to earn the full 15 days, leaving many with fewer days of credit or none at all; DOC also failed to consistently provide opportunities for 10-day “boost time” credits or 80-day “completion” credits as provided by the good time statute. Indeed, Commissioner Mici even revoked good time that she had promised to prisoners who agreed to be vaccinated, because she concluded that such credit was inconsistent with the Governor’s policy regarding reduced

prison terms. Neither did DOC make meaningful or expedited use of medical parole. The most egregious failure, though, was the DOC's defiance of the budget line item (the "decarceration law") enacted by the Massachusetts Legislature on December 28, 2020, over Governor Baker's veto, requiring the DOC to reduce its population in the face of COVID-19, and giving it powerful new tools to do so. The law provides, in relevant part:

[T]he commissioner of correction shall release, transition to home confinement or furlough individuals in the care and custody of the department who can be safely released, transitioned to home confinement or furloughed with prioritization given to populations most vulnerable to serious medical outcomes associated with COVID-19 according to the Centers for Disease Control and Prevention's guidelines; provided further, that the department shall consider, but shall not be limited to considering: 1) the use of home confinement without exclusion pursuant to chapter 211F of the General Laws; 2) the expedition of medical parole petition review by superintendents and the commissioner; 3) the use of furlough; (4) the maximization of good time by eliminating mandates for participation in programming for those close to their release dates; and (5) awarding credits to provide further remission from time of

sentence for time served during periods of declared public health emergencies impacting the operation of prisons[.]<sup>2</sup>

The law states that Defendant Mici “shall” release those who can safely be released, requiring her to prioritize the vulnerable but to consider all in DOC custody. The law gives her an arsenal of previously unavailable mechanisms to accomplish this mandate, and it obligates her to consider these mechanisms and any other available means to reduce the population. Despite this legislative command, Defendant Mici takes the position that the law changed nothing. She continues to make only token use of her authority to release prisoners on home confinement or medical parole; she has refused to maximize good time by removing program participation requirements for those close to release; and she has not awarded any sentence-reduction credits for time served during the “declared public health emergency” due to COVID-19.

Vaccination of willing prisoners and staff does not eliminate the need for social distancing and thus the need for population reduction. The Legislature passed the decarceration law knowing that prisons were prioritized in Phase 1 of the state’s vaccination program. About a third of

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<sup>2</sup> Chapter 227 of the Acts of 2020, Section 2, line item 8900-0001 (emphasis added), available at <https://malegislature.gov/Budget/FY2021/FinalBudget>.

those in custody and more than half of DOC staff have refused the vaccine, leaving prisons vulnerable to rapid spread of the virus. Furthermore, vaccines are not totally effective and since it is not yet known to what extent those who are vaccinated can still spread the disease, the CDC, National Institutes of Health, and Massachusetts Department of Public Health continue to emphasize social distancing.

The DOC's failure to reduce the population has necessitated restrictions on activities that have left incarcerated people isolated and idle, with severe effects on mental health. At the same time, the Department has dramatically curtailed medical and mental health care and has been unable to provide adequate care under COVID-19 restrictions at current population levels. Indeed, DOC has been unable to identify and provide extra protection to those at greatest risk of severe illness from COVID-19 or to safely provide COVID-19 isolation and quarantine. Only a reduction of population will ease the limitations on movement and programs, and the other hardships and threats to health and safety that DOC continues to impose on those in its custody. DOC has not said when it will return to normal operations, tacitly acknowledging the ongoing danger of widespread infection.



Plaintiffs hope the current ebb in active cases of COVID-19 in DOC will last despite the recent increase in community cases. But the substantial risk of serious harm from further continued outbreaks of COVID-19 remains.

### **Issues of Law Raised by the Appeal**

- A. Whether the Superior Court erred in finding that Plaintiffs had not shown a likelihood of success on the merits of their claim that they were exposed to harm from COVID-19 in violation of the Eighth Amendment to the U.S. Constitution, where the court found no deliberate indifference to prisoners' health and safety despite Defendants' persistent refusal to take easily available action to control the spread of the disease by releasing prisoners and allowing for social distancing.
- B. Whether the Superior Court erred in failing to rule on the other elements required for preliminary relief: namely, that denial of the injunction would result in irreparable harm, that the risk of irreparable harm outweighs any similar risk of harm to Defendants, and that preliminary relief would serve the public interest where:

1. The court relied on its erroneous determination regarding deliberate indifference in declining to reach the other factors;
2. Plaintiffs will suffer irreparable harm absent preliminary relief due to the nature of the risk from COVID-19;
3. There is no harm to Defendants from releasing prisoners who do not pose a risk to public safety, and a reduced population would give Defendants greater flexibility in administering state prisons during the pandemic; and
4. The public interest will be served by a grant of preliminary relief because it will prevent prisons from becoming the locus of new infections in the community and burdening the public health system; will protect prisoners *as* members of the public; and will not require Defendants to release any prisoners deemed to pose a public safety risk.

These issues were raised and preserved in the Superior Court.

### **Argument**

The COVID-19 crisis in Massachusetts prisons is not over. With more than half of all DOC staff and about a third of those in custody refusing to be vaccinated, the prospect of renewed outbreaks is real. The measures

taken by DOC to control the spread of the virus failed in the spring of 2020 and failed catastrophically again in the fall and winter. Over 3,000 prisoners in Massachusetts have been confirmed to have contracted the virus — nearly half of the roughly 6,300 in DOC custody. Prisoners are still unable to socially distance and, due to the ongoing danger, they still live intolerably constricted lives, mostly locked down with few group activities. Yet, unlike in other states, Defendants refuse to release, even to home confinement, more than a token number of prisoners, thereby rejecting the only realistic step that could provide greater safety and humane conditions. The preliminary injunction sought by Plaintiffs would provide this safe population reduction.

The Superior Court's ruling that Plaintiffs are unlikely to succeed on the merits of their Eighth Amendment claim is in error, given the substantial risk of serious harm faced by Plaintiffs and Defendants' deliberate indifference in failing to take easily available steps to reduce that harm. The court's failure to address the other factors required by a preliminary injunction was thus also in error. The harm to Plaintiffs is clearly irreparable, Defendants will not be harmed by preliminary relief,

and the public interest will be served by immediate prison population reduction.

**I. The Superior Court Erroneously Concluded Plaintiffs Were Not Likely to Succeed on the Merits**

**A. Plaintiffs Showed Substantial Risk of Serious Harm**

The Superior Court found that “conditions inside DOC facilities continue to deprive inmates of basic needs and present a significant risk of serious harm.” Op. at 3. Indeed, the SJC has already recognized that “plaintiffs almost certainly will succeed in establishing the objective component of their claims under the Eighth Amendment[.]” *Foster v. Comm’r of Correction*, 484 Mass. 698, 718 (2020). Although the Superior Court recognized a “significant risk of serious harm” from active COVID-19 cases and from restrictions that “deprive [prisoners] of pre-pandemic opportunities for recreation, work, education, and other activities,” Op. at 3-4, it nevertheless declined to rule on objective harm, because of its erroneous holding that Plaintiffs had failed to show deliberate indifference. Given the ongoing threat from the virus, the court should have concluded that Plaintiffs face a substantial risk of serious harm.

**A. The Court Erred in Failing to Find Deliberate Indifference**

# **1. The Court misapplied the deliberate indifference standard.**

The Superior Court erred in holding that Commissioner Mici's refusal to use easily available mechanisms to release prisoners did not constitute deliberate indifference. In deciding that Defendants' efforts to control COVID-19 were sufficient, the court cited the SJC's statement that "[w]here the risk of serious harm is substantial, but prison officials have undertaken significant steps to try to reduce the harm and protect inmates, courts have concluded that there was no Eighth Amendment liability." Op. at 9 (citing *Foster*, 484 Mass. at 720). But the Superior Court ignored an important corollary of that principle: prison officials are deliberately indifferent, regardless of the steps they have taken, when they fail "to take reasonable measures to abate" a known, substantial risk of serious harm. *Farmer*, 511 U.S. at 847; *Ahearn v. Vose*, 64 Mass. App. Ct. 403, 417 (2005) (correctional staff violate Eighth Amendment when they "fail[] to take 'easily available measures' to reduce the known risk to the plaintiffs' health"). Put simply, where all the protective efforts of correctional officials have proved to be inadequate, their refusal to take obvious additional steps constitutes deliberate indifference.

That is the case here. The surge of infections last fall and winter shows that the remedial measures that Defendants hoped would control the virus failed. Despite knowing that their efforts were inadequate, Defendants continue to refuse to reduce the prison population to allow for greater social distancing, even though the SJC and the Legislature have warned that this is essential.<sup>3</sup>

The deliberate indifference standard “does not mandate perfect implementation, but it also does not set a bar so low that any response by officials will satisfy it.” *Valentine v. Collier*, 141 S. Ct. 57, 2020 WL 6704453, at \*4 (Nov. 16, 2020) (Sotomayor, J., dissenting) (internal citations omitted). Prison officials cannot insulate themselves from liability by taking steps that are clearly insufficient to address a serious risk of harm. *See Brown v. Plata*, 563 U.S. 493, 499-502 (2011) (ordering release of thousands of prisoners to ensure constitutionally adequate health care when lesser

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<sup>3</sup> This Court has repeatedly warned of the need for population reduction. *See Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 445 (2020); *Foster*, 484 Mass. at 701; *Christie v. Commonwealth*, 484 Mass. 397, 401-02 (2020); *Commonwealth v. Nash*, 486 Mass. 394, 409 (2020). Perhaps the loudest warning came from the Legislature, which in late December 2020, knowing that prisoners were about to receive vaccinations, nevertheless commanded decarceration measures to reduce the threat of COVID-19 in prison.

remedies had proven “insufficient” or “ineffectual”); *Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985); *DeGidio v. Pung*, 920 F.2d 525, 531 (8th Cir. 1990). Thus, courts during the pandemic have found deliberate indifference even where correctional officials undertake considerable efforts to protect against COVID-19. *See, e.g., Savino v. Souza*, 459 F. Supp. 3d 317, 329 (D. Mass. 2020); *Smith v. Barr*, --- F. Supp. 3d ---, 2021 WL 71168, at \*9 (S.D. Ind., Jan. 7, 2021).

At the time of the SJC’s prior ruling in this case, the DOC’s infection control measures were newly put in place; time had not yet proved their inadequacy. *See* 484 Mass. at 707-09 (describing PPE, screening, quarantine, and testing measures put in place in April and May 2020). Even then, Commissioner Mici agreed on the need for population reduction, *id.* at 709, and the Court anticipated that the Commissioner would make use of home confinement and other release measures, *id.* at 733. Commissioner Mici at that time had also not refused to use the decarceration law, a potent tool for reducing prison density now available to her. By the time of the Superior Court ruling in February, however, the failure of existing measures, the need for population reduction, and the Commissioner’s refusal to take available steps to release people were undeniable.

The fact that infection levels have recently dropped again does not negate Defendants' deliberate indifference to the ongoing threat of COVID-19 outbreaks. "[J]ust as 'the increased rate of infection' does not itself prove deliberate indifference, the absence of known infections does not disprove deliberate indifference." *Savino v. Souza*, No. 20-10617, 2020 WL 3529664, at \*5 (D. Mass. June 18, 2020). Even with very low rates of infection, "[s]ocial distancing is a 'cornerstone' of COVID-19 prevention," and deliberate indifference is shown where the government "chose to pretend that social distancing was not critical." *Id.* at \*2.

The Superior Court erred in holding that Defendant Mici's manifestly unsuccessful efforts to control the virus without releasing people satisfied her obligations under the Eighth Amendment. Her refusal to use the tools at her fingertips to prevent infection and death constitutes deliberate indifference.

**2. The Superior Court failed to take account of Defendants' refusal to employ the decarceration law.**

The Superior Court erroneously failed to consider the Defendants' refusal to comply with the decarceration law as evidence of deliberate indifference.<sup>4</sup> The decarceration law states that Commissioner Mici "*shall*

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<sup>4</sup> The Plaintiffs do not challenge the court's holding that they were required to amend their complaint to present a separate claim for declaratory relief



release, transition to home confinement or furlough individuals in the care and custody of the department” where that can be done safely, with priority given to the most medically vulnerable.<sup>5</sup> It requires the Commissioner to consider means of population reduction including home confinement, medical parole, and furloughs, and it newly allows not only good time sentence reductions without program participation but also the award of sentence credits for time served during the declared public health emergency.

The Superior Court ignored Plaintiffs’ argument that Commissioner Mici’s failure to use these new release mechanisms constituted deliberate indifference. Instead, the Court erroneously assessed Commissioner Mici’s ability to reduce the population based only on DOC’s authority under existing statutes and regulations – as if the new law had never been passed. *See Op.* at 9-10 (citing declaration of Defendant Mici).

## **II. The Balance of Harms and the Public Interest Favor a Preliminary Injunction**

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under G.L. c. 231A § 2 alleging that Defendants-Respondents are violating the decarceration law.

<sup>5</sup> Chapter 227 of the Acts of 2020, Section 2, line item 8900-0001 (emphasis added), available at <https://malegislature.gov/Budget/FY2021/FinalBudget>.

Because the court erroneously found Plaintiffs unlikely to prevail on the merits of their claim, it failed to analyze the other factors applicable to a request for a preliminary injunction: whether the denial of the injunction would result in irreparable harm; whether the risk of irreparable harm outweighs any similar risk of harm to the defendants; and whether preliminary relief would serve the public interest. *Doe v. Worcester Pub. Schs.*, 484 Mass. 598, 601 (2020). Each favors a preliminary injunction.

**A. The Superior Court Erred in Failing to Find a Likelihood of Irreparable Harm from Denial of the Injunction**

Illness and death from COVID-19 in prison are paradigmatic of irreparable harm, as courts across the country have recognized.<sup>6</sup> The risk posed by COVID-19 constitutes irreparable harm even when current levels of infection are low. *See Nash*, 386 Mass. at 409 (“[W]e have seen that the COVID-19 virus spreads rapidly, and that a few cases, or even no reported cases, on any given day or in any given place can quickly change to many cases.”). Once the virus penetrates a facility, it is too late to prevent a

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<sup>6</sup> *See, e.g., Rafael L.O. v. Tsoukaris*, No. CV 20-3481, 2020 WL 1808843, at \*8 (D.N.J. Apr. 9, 2020); *Thakker v. Doll*, 451 F. Supp. 3d 358, 370 (M.D. Pa. 2020); *Arias v. Decker*, 459 F. Supp. 3d 561, 569-71 (S.D.N.Y. 2020); *Coronel v. Decker*, 449 F. Supp. 3d 274, 281 (S.D.N.Y. 2020).

conflagration; waiting to take action until there is another surge is therefore irresponsible and doomed to fail.

The harm from the widespread isolation and idleness caused by continued threat of infection is similarly irreparable. *See, e.g., Larocque v. Turco*, No. SUCV202000295, 2020 WL 2198032, at \*15 (Mass. Super. Feb. 28, 2020) (one-week lockdown constituted irreparable harm).

**B. The Risk of Irreparable Harm Outweighs Any Risk of Harm to Defendants and Preliminary Relief Is In the Public Interest**

Defendants cannot claim that the preliminary relief sought would harm them. Commissioner Mici admitted that lawful population reduction is a “desirable goal to control the spread” of COVID-19. *Foster*, 484 Mass. at 732. Population reduction would also reduce the fiscal and operational burden of incarcerating so many people during the pandemic, and it would give DOC more flexibility to house and care for those who remain imprisoned.

Preventing additional outbreaks of COVID-19 in prisons will further the public interest. Because prisons rely on outside hospitals, outbreaks there “will further burden the broader health care system[.]” *Committee for Pub. Counsel Servs.*, 484 Mass. at 437. In addition, medical, correctional, and other staff entering and leaving prisons daily “risk bringing infections

home to their families and broader communities.” *Id.* The risk is particularly acute given the spread of new COVID variants that make the vaccine less effective. And it should not be forgotten that incarcerated people are themselves members of the public, with an obvious interest in the requested relief. *Cf. Christie*, 484 Mass. at 398-401 (in considering “danger to other persons and the community” in stay of execution pending appeal, a court should consider “the health risk *to the defendant* if the defendant were to remain in custody”).

The requested relief would not threaten public safety, as it leaves DOC to assess which individuals in its custody can safely be released.

### **Reasons Why Direct Appellate Review is Appropriate**

A case will be considered for direct appellate review by the SJC where it raises:

(1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

Mass. R. App. P. 11(a). This case warrants review under each of these criteria.

With respect to the first basis for granting review, determining the constitutional obligations of state officials to those in custody in the context of an ongoing pandemic raises novel and urgent questions of law, the resolution of which may also establish principles applicable to future public health crises. As to the second factor, whether the failure to take reasonable, available measures to avert a known harm to prisoners – when other measures have failed – violates the 8<sup>th</sup> Amendment is an important question of broad implication. As to the final factor, the public interest will be served by direct appellate review. A prompt ruling from the SJC is necessary to ensure that depopulation or other necessary relief can be implemented in a timely fashion to minimize the risk of further sickness and death within DOC facilities. The public interest will be served by clear guidance as to the scope of Defendants’ duty in the face of a pandemic such as COVID-19, as prisons spread infection within and without their walls.

## **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their application for direct appellate review.

Dated: April 22, 2021

Respectfully Submitted,

/s/ Michael J. Horrell

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### CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2021 Plaintiffs served the foregoing application and accompanying appendix upon counsel of record for the Defendants by email to the following addresses:  
  
stephen.dietrick@state.ma.us and pamela.a.murphy@state.ma.us.

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### CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Mass. R. App. P. 11(b) and 16(k) that this petition substantially complies with the applicable filing requirements. The petition is written in size 14 Book Antiqua proportionally spaced font and the argument section consists of 1,998 words as determined by Microsoft Word version 2103.

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Appendix to Plaintiffs-Petitioners' Application for Direct Appellate Review by the  
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SUPREME JUDICIAL COURT  
for Suffolk County  
Case Docket

STEPHEN FOSTER, MICHAEL GOMES, PETER KYRIAKIDES, RICHARD O'ROURKE STEVEN PALADINO, MARK SANTOS, DAVID SIBINICH, MICHELLE TOURIGNY, MICHAEL WHITE, FREDERICK YEOMANS, and HENDRICK DAVIS, individually and on behalf of all others similarly situated,  
v. CAROL MIEL, Commissioner of the Massachusetts Department of Correction, GLORIANN MORONEY, Chair Massachusetts Parole Board, THOMAS TURCO, Secretary of the Executive Office of Public Safety and Security, and CHARLES BAKER, Governor of the Commonwealth of  
Massachusetts  
SJ-2020-0212

CASE HEADER

|                |                           |                |                           |
|----------------|---------------------------|----------------|---------------------------|
| Case Status    | Disp: No action necessary | Status Date    | 06/02/2020                |
| Nature         | Declaratory J./Injunction | Entry Date     | 04/17/2020                |
| Sub-Nature     | COVID-19 Related          | Single Justice | Cypher, J.                |
| TC Ruling      |                           | TC Ruling Date |                           |
| SJ Ruling      |                           | TC Number      |                           |
| Pet Role Below |                           | Full Ct Number | <a href="#">SJC-12935</a> |
| Lower Court    |                           | Lower Ct Judge |                           |

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Plaintiff

Peter Kyriakides  
Plaintiff

Richard O'Rourke  
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Steven Paladino  
Plaintiff

Mark Santos  
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[Michael Horrell, Esquire](#)

[Elizabeth D. Matos, Esquire](#)  
[James R. Pingeon, Esquire](#)

**Frederick Yeomans**  
Plaintiff

**Hendrick Davis**  
Plaintiff

**Carole Mici**  
Respondent

**Gloriann Maroney**  
Respondent

**Thomas Turco**  
Respondent

**Charles Baker**  
Respondent

**Clerk - SJ for the Commonwealth**  
Clerk for Commonwealth

[Bonita Tenneriello, Esquire](#)  
[David Milton, Esquire](#)  
[Michael Horrell, Esquire](#)

[Elizabeth D. Matos, Esquire](#)  
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[Bonita Tenneriello, Esquire](#)  
[David Milton, Esquire](#)  
[Michael Horrell, Esquire](#)

#### DOCKET ENTRIES

| Entry Date | Paper | Entry Text  |
|------------|-------|---|
| 04/17/2020 |       | Case entered.   |
| 04/17/2020 | #1    | Class Action Complaint Pursuant to COVID-19 filed for Stephen Foster & others by Atty. Elizabeth D. Matos, Atty. James R. Pingeon, Atty. Bonita P. Tenneriello, Atty. David Milton and Atty. Michael J. Horrell.                                  |
| 04/17/2020 | #2    | Emergency MOTION for Preliminary Injunctive Relief filed for Stephen Foster & others by Atty. Elizabeth D. Matos, Atty. James R. Pingeon, Atty. Bonita P. Tenneriello, Atty. David Milton and Atty. Michael J. Horrell.                           |
| 04/17/2020 | #3    | Plaintiff's Memorandum in Support of Their Motion for Preliminary Injunction filed for Stephen Foster & others by Atty. Elizabeth D. Matos, Atty. James R. Pingeon, Atty. Bonita P. Tenneriello, Atty. David Milton and Atty. Michael J. Horrell. |
| 04/17/2020 | #4    | Certificate of Service for paper #'s 1-3 filed by Atty. Bonita P. Tenneriello.  |
| 04/17/2020 |       | Under advisement. (Cypher, J.)  |

"The plaintiffs filed their complaint, as a putative class action, on the evening of Friday, April 17, 2020. As explained below, I reserve and report the case to the full court and, to ensure that the court has an adequate factual record to decide the case, I also refer the matter to the Superior Court for fact-finding.

1. Reservation and report. I hereby reserve and report the case to the full court. The record before the full court will consist of the complaint, the motion for a preliminary injunction, exhibits to the motion, an answer to be filed by the defendants in the full court no later than 5:00 p.m. on Friday, April 24, 2020, a statement of agreed facts to be filed by the parties, and findings of fact to be made in the Superior Court, as outlined below.

2. Reference to the Superior Court. I also refer this matter to the Superior Court for fact-finding that will enable the full court to decide the case in the first instance. The Chief Justice of the Superior Court will designate a judge to conduct the necessary proceedings and to make the appropriate findings.

To facilitate the fact-finding in an expeditious manner, the parties shall submit their statement of agreed facts (to the full court and to the Superior Court) no later than 5:00 p.m. on Friday, April 24, 2020, indicating, to the fullest extent possible in the circumstances, all areas of factual agreement. The parties shall also indicate those material factual issues as to which they do not agree. The plaintiffs shall have responsibility for initiating the statement of facts.

The judge designated to hear this matter shall conduct proceedings in the Superior Court in the manner, and at such times, as he or she deems necessary in order to report his or her findings to the full court no later than Friday, May 1, 2020. The parties should be prepared to provide witnesses and any other evidence they intend to provide, and such other evidence as the judge may require, expeditiously in accordance with the schedule set by the judge. Any issues and concerns involving the timing of the proceedings, availability of witnesses, and so on shall be resolved by the Superior Court judge in the first instance.

The judge should make any and all findings, beyond the facts agreed to by the parties, that he or she deems necessary and relevant to the resolution of the legal issues raised by the plaintiffs in their complaint. The judge's findings shall be transmitted directly to the full court. Recognizing that time is of the essence, if the judge determines that he or she cannot complete the fact-finding on or before May 1, he or she shall report that to the full court as early as possible, shall indicate what further steps remain to be taken, and shall propose for the full court's consideration a time-frame within which all of the necessary proceedings and the fact-finding will be completed.

The parties are directed to make every reasonable effort to assist the judge, in the manner he or she prescribes, with this fact-finding process. They are reminded that the full court will be deciding this case in the first instance, and their failure to furnish the full court with an adequate factual record could impede the court's ability to do so.

3. Logistics for filing written material. Copies of all documents filed to date in the Supreme Judicial Court for the County of Suffolk (county court) will be transferred by the Clerk of the county court to the Supreme Judicial Court for the Commonwealth (full court). Unless directed otherwise by the Superior Court judge, the parties shall electronically file all further papers that are intended for the Superior Court in the first instance with the Clerk of the full court. The Clerk of the full court will assist the Superior Court assistant clerk assigned to this matter by forwarding electronically all such papers to the assistant clerk and to the judge.

4. Further proceedings in the full court. The Clerk of the full court, in consultation with the Chief Justice, will schedule this matter for a hearing before the full court in due course, and will notify counsel accordingly. Counsel should be prepared to brief and argue the case in short order after the completion of the fact-finding. Alternatively, either side or both sides may, if they wish, file a preliminary brief in the full court by Friday, May 1, 2020, addressing the general legal principles to be applied, and thereafter, once the fact-finding is complete, shall file a supplemental brief on a timetable to be established by the full court addressing the facts found and the application of the law to the facts; if the parties use this option, they shall ensure that their preliminary and supplemental briefs are not redundant or, when combined, excessive. If a party chooses to wait until the completion of the fact-finding to file a single all-encompassing brief, they will nevertheless be required to file the brief on the short timetable to be set by the court.

The Clerk of the county court shall send a copy of this order to the Chief Justice of the Superior Court and to the Clerk of the Suffolk Superior Court for civil business. All additional issues and questions concerning this order and the scheduling of the case before the full court shall be directed to the Clerk of the full court."

04/20/2020 #6

Notice of assembly of the record.

04/20/2020

Notice to counsel/parties and trial court via E-mail correspondence, regarding paper #5 &amp; 6 filed.

04/23/2020 #7

Letter to S.J.C. for Suffolk County from S.J.C. for the Commonwealth NOTICE OF ENTRY "Pursuant to Mass. R.A.P. 10 (a) (3), you are hereby notified that, on April 20, 2020, the above referenced case was entered on the docket of this court. (SJC-12935)" (Francis V. Kenneally, Clerk)

05/05/2020

Filing fee paid. (\$315.00)

06/02/2020 #8

Rescript: (June 2, 2020) ORDERED, that the following entry be made in the docket; viz., - "The motion for a preliminary injunction is denied. The matter is transferred to the Superior Court, where litigation on the complaint shall proceed as an emergency matter, with due speed in consideration of the circumstances, before the same Superior Court judge who was designated to make findings of fact with respect to the motion for a preliminary injunction. In addition to rulings on the merits, the judge shall resolve all questions of class certification, including any amendment of the complaint or substitution of parties." [NO action necessary by single justice as full court ordered denial].

06/02/2020 #9

Rescript: (June 2, 2020)...ORDERED, that the following entry be made in the docket; viz., -- The Governor's motion to dismiss the complaint is allowed. The parole board's motion is allowed only with respect to the claims of the individuals civilly committed under G. L. c. 123, § 35, and is otherwise denied. [No action by single justice is necessary because full court issued order].



SUPREME JUDICIAL COURT  
for the Commonwealth  
Case Docket

STEPHEN FOSTER & others vs. CAROL MICI, COMMISSIONER OF THE  
MASSACHUSETTS DEPARTMENT OF CORRECTION & others  
SJC-12935

CASE HEADER

|                |   |                 |                       |
|----------------|---|-----------------|-----------------------|
| Case Status    | Decided, Rescript issued                                    | Status Date     | 06/02/2020            |
| Nature         | Nature to be determined                                     | Entry Date      | 04/20/2020            |
| Appellant      | Plaintiff   | Case Type       | Civil                 |
| Brief Status   |   | Brief Due       |                       |
| Quorum         | Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, Kafker, JJ. | Decision Date   | 06/02/2020            |
| Argued Date    | 05/07/2020  | Citation        | 484 Mass. 698         |
| AC/SJ Number   | <a href="#">SJ-2020-0212</a>                                | Lower Ct Number | SJ-2020-0212          |
| DAR/FAR Number |   | Lower Ct Judge  | Elsbeth B. Cypher, J. |
| Lower Court    | SJC for Suffolk County                                      |                 |                       |
| Route to SJC   | Direct Entry: Single Justice Reservation & Report           |                 |                       |

ADDITIONAL INFORMATION

No. 2 reported at vol.484, p.1059

INVOLVED PARTY

Stephen Foster  
Petitioner/Appellant

Michael Gomes  
Petitioner/Appellant

Peter Kyriakides  
Petitioner/Appellant

Richard O'Rourke  
Petitioner/Appellant

Steven Paladino  
Petitioner/Appellant

Mark Santos  
Petitioner/Appellant

David Sibinich  
Petitioner/Appellant

Michelle Tourigny  
Petitioner/Appellant

Michael White  
Petitioner/Appellant

ATTORNEY APPEARANCE

[Elizabeth D. Matos, Esquire](#)  
[James R. Pingeon, Esquire](#)  
[Bonita Tenneriello, Esquire](#)  
[David Milton, Esquire](#)  
[Michael Horrell, Esquire](#)

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**Frederick Yeomans**  
Petitioner/Appellant

**Hendrick Davis**  
Petitioner/Appellant

**Carol Mici, Commissioner of the Massachusetts Department of Correction**  
Respondent/Appellee

**Glorian Moroney, Chair Massachusetts Parole Board**  
Respondent/Appellee

**Thomas Turco, Secretary of the Executive Office of Public Safety and Security**  
Respondent/Appellee

**Charles Baker, Governor of the Commonwealth of Massachusetts**  
Respondent/Appellee

**Disability Law Center**  
Amicus  
Awaiting green brief

**District Attorney for Suffolk County**  
Amicus  
Awaiting green brief

**Representative for the 9th Suffolk District**  
Amicus  
Awaiting green brief

**American Civil Liberties Union of Massachusetts, Inc.**  
Amicus  
Awaiting green brief

**Massachusetts Association of Criminal Defense Lawyers**  
Amicus  
Awaiting green brief

[David Milton, Esquire](#)  
[Michael Horrell, Esquire](#)

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[David Milton, Esquire](#)  
[Michael Horrell, Esquire](#)

[Nancy Ankers White, Esquire](#)  
[Stephen G. Dietrick, Esquire](#)

[Pamela Murphy, Esquire](#)  
[Michael R. Byrne, Esquire](#)

[Stephen G. Dietrick, Esquire](#)

[M. Patrick Moore Jr., Special A.A.G.](#)  
[Ryan P. McManus, Special A.A.G.](#)  
[Vanessa Azniv Arslanian, Special A.A.G.](#)  
[Matthew Steele, Esquire](#)

[Rachael Splaine Rollins, District Attorney](#)

[Matthew Segal, Esquire](#)

[Matthew Segal, Esquire](#)

#### DOCKET ENTRIES

| Entry Date | Paper | Entry Text   |
|------------|-------|--|
| 04/20/2020 | #1    | Entered.   |
| 04/21/2020 | #2    | Class Action Complaint filed for Stephen Foster & others by Attorney Bonita P. Tenneriello & others.   |
| 04/21/2020 | #3    | Emergency Motion for Preliminary Injunctive Relief, filed for Stephen Foster & others by Attorney Bonita P. Tenneriello & others.  |
| 04/21/2020 | #4    | Memorandum in Support of Paper #3 with Exhibits, filed for Stephen Foster & others by Attorney Bonita P. Tenneriello & others.   |
| 04/21/2020 | #5    | Copy of Order of Designation received from Chief Justice Judith Fabricant.   |
| 04/24/2020 | #6    | Appearance filed for Charles Baker, Governor of the Commonwealth of Massachusetts by M. Patrick Moore, Special A.A.G., Ryan P. McManus, Special A.A.G., and Vanessa A. Arslanian, Special A.A.G..  |
| 04/24/2020 | #7    | MOTION TO DISMISS APPEAL filed for Charles Baker, Governor of the Commonwealth of Massachusetts by Attorney Michael P. Moore, Attorney Ryan McManus  |
| 04/24/2020 | #8    | MOTION TO DISMISS APPEAL filed for the Parole Board by Attorney Pamela Murphy.   |
| 04/24/2020 | #9    | ORDER: The Governor's memorandum in support of the motion to dismiss shall be filed by Wednesday, April 29, 2020, at 4 PM; the plaintiffs' opposition, if any, shall be filed by Monday, May 4, at 4 PM.   |
| 04/24/2020 | #10   | ORDER: The Parole Board's memorandum in support of the motion to dismiss shall be filed by Wednesday, April 29, 2020, at 4 PM; the plaintiffs' opposition, if any, shall be filed by Monday, May 4, at 4 PM.   |
| 04/24/2020 | #11   | Appearance filed for Carol Mici, Commissioner of the Massachusetts Department of Correction and Thomas Turco, Secretary of the Executive Office of Public Safety and Security by Stephen Dietrick, Deputy General Counsel.   |
| 04/24/2020 | #12   | Answer to Plaintiff's Class Action Complaint with Affidavits filed for Carol Mici, Commissioner of the Massachusetts Department of Correction and Thomas Turco, Secretary of the Executive Office of Public Safety and Security by Stephen Dietrick, Deputy General Counsel. |
| 04/24/2020 | #13   | Proposed Statement of Agreed Facts filed for Carol Mici, Commissioner of the Massachusetts Department of Correction by Stephen Dietrick, Deputy General Counsel.   |

|                |  |
|----------------|--|
| 04/24/2020 #14 | Statement of Agreed Facts between Plaintiffs and Department of Correction filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello & others. |
| 04/24/2020 #15 | Statement of Facts not agreed to by the Department of Correction filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello & others.          |
| 04/24/2020 #16 | Stipulation as to facts agreed between the Plaintiffs and the Governor filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello & others.    |
| 04/24/2020 #17 | Statement of Facts not agreed to by Governor Baker filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello & others.                        |
| 04/27/2020 #18 | Stipulation as to Facts agreed between the Plaintiffs and the Chairperson of the Massachusetts Parole Board, filed by Pamela Murphy, General Counsel & others.   |
| 04/29/2020 #19 | Memorandum in Support of Motion to Dismiss filed for Charles Baker, Governor of the Commonwealth of Massachusetts by Ryan McManus, Special A.A.G. & others.  |
| 04/29/2020 #20 | Memorandum in Support of Motion to Dismiss filed for the Massachusetts Parole Board by Pamela Murphy, General Counsel.   |
| 04/30/2020 #21 | Supplemental Affidavit of Carol Mici with Exhibits filed by Attorney Stephen Dietrick.   |
| 04/30/2020 #22 | Supplemental Affidavit of Jennifer Gaffney filed by Attorney Stephen Dietrick.   |
| 04/30/2020 #23 | Supplemental Affidavit of Kevin Crowely filed by Attorney Stephen Dietrick.  |
| 05/01/2020 #24 | Findings of Fact of the Superior Court   |
| 05/01/2020 #25 | ORDER: In light of the Superior Court's factual findings and in accordance with the single justice's reservation and report, the parties shall file their briefs by Wednesday, May 6, 2020, at 5 PM. Oral argument is scheduled for Thursday, May 7, 2020, at 1 PM.  |
| 05/01/2020 #26 | Appendix filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello.   |
| 05/04/2020     | Filing fee of \$300.00 received from Massachusetts Legal Services, Inc.  |
| 05/04/2020 #27 | OPPOSITION to Paper #8 filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello.   |
| 05/04/2020 #28 | OPPOSITION to Paper #7 filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello.   |
| 05/06/2020 #29 | Motion for leave to file reply in support of motion to dismiss filed for Charles Baker, Governor of the Commonwealth of Massachusetts by Ryan McManus, Special A.A.G..   |
| 05/06/2020 #30 | Amicus brief filed for the Disability Law Center by Attorney Tatum Pritchard.  |
| 05/06/2020 #31 | Appearance filed for Gloriann Moroney, Chair Massachusetts Parole Board by Attorney Michael Byrne.   |
| 05/06/2020 #32 | Appellee brief filed for Carol Mici, Commissioner of the Massachusetts Department of Correction and Thomas Turco, Secretary of the Executive Office of Public Safety and Security by Attorney Stephen Dietrick.  |
| 05/06/2020 #33 | Appellant brief filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello.  |
| 05/07/2020     | Oral argument held. (Gants, C.J., Lenk, J., Gaziano, J., Lowy, J., Budd, J., Cypher, J., Kafker, J.). <a href="#">View Webcast</a>   |
| 05/07/2020 #34 | Amicus Letter filed for the District Attorney for Suffolk County and the Representative for the 9th Suffolk District by Rachael Rollins, District Attorney and Jon Santiago, Representative.   |
| 05/08/2020 #35 | Amicus Letter filed for American Civil Liberties Union of Massachusetts, Inc. and Massachusetts Association of Criminal Defense Lawyers by Attorney Matthew Segal.   |



|                |   |
|----------------|---|
| 05/08/2020 #36 | <p><u>ORDER</u>: It is ORDERED that no later than 5:00 P.M. on May 13, the following parties are directed to submit to the court a 16(l) letter answering the following questions:</p> <p><u>For the Commissioner of Correction and the Chair of the Massachusetts Parole Board</u>, (1) For each month from January 2019 through the present, what is the number of persons admitted to DOC custody and the number of persons released from DOC custody? (2) Of the number of persons released for each month in 2020, how many were released (a) because of the completion of their sentence, (b) because of the grant of a parole permit, (c) because of other reasons? (3) Of the number of person admitted for each month in 2020, what was the reason for their admission (e.g. sentenced by court, parole violation, etc.). (4) If the number of persons released was significantly lower in April 2020 than in earlier months, what were the reason(s) for the reduction?</p> <p><u>For the Commissioner of Correction only</u>, (1) What is the longest period of lockdown in recent memory in any DOC facility? (2) At oral argument, it was represented that the DOC now has available approximately 10,000 COVID-19 tests and that it plans to use them in some form of testing program. What is the number of tests available at this time? When did large-scale testing become available to DOC? What is the DOC's testing plan and the timeline for implementation? Does the DOC have access to a sufficient number of tests to implement that plan? To whom would the tests be administered under the plan (e.g., inmates, correctional officers, other staff) and using what criteria (e.g., symptomatic, non-symptomatic, relevant contact with someone who tested positive, by facility, etc.) ?</p> <p>(3) What is the DOC plan to manage what it characterized as "hot spots"? (4) What is the percentage of DOC inmates who are 50-59 years old? What is the percentage of DOC inmates who are 60 or older?</p> <p><u>For the plaintiffs</u>, (1) Was relief granted in <u>Brown v. Plata</u>, 563 U.S. 493 (2011), under 42 U.S.C. § 1983? (2) If so, what case citation or other support do you have for so finding? If not, what was the source of the relief granted?</p> |
| 05/12/2020 #37 | Supplemental Citation filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello.   |
| 05/13/2020 #38 | Supplemental Citation filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello.   |
| 05/13/2020 #39 | Supplemental Citation filed for Gloriann Moroney, Chair Massachusetts Parole Board by Attorney Michael Byrne.   |
| 05/13/2020 #40 | Supplemental Citation filed for Carol Mici, Commissioner of the Massachusetts Department of Correction and Thomas Turco, Secretary of the Executive Office of Public Safety and Security by Attorney Stephen Dietrick.  |
| 05/21/2020 #41 | Post-Argument Letter filed for Carol Mici, Commissioner of the Massachusetts Department of Correction and Thomas Turco, Secretary of the Executive Office of Public Safety and Security by Attorney Stephen Dietrick.   |
| 05/26/2020 #42 | Supplemental Citation filed for Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans and Hendrick Davis by Attorney Bonita Pia Tenneriello.   |
| 06/02/2020 #43 | RESCRIPT (Full Opinion): The motion for a preliminary injunction is denied. The matter is transferred to the Superior Court, where litigation on the complaint shall proceed as an emergency matter, with due speed in consideration of the circumstances, before the same Superior Court judge who was designated to make findings of fact with respect to the motion for a preliminary injunction. In addition to rulings on the merits, the judge shall resolve all questions of class certification, including any amendment of the complaint or substitution of parties. (By the Court)  |
| 06/02/2020 #44 | RESCRIPT (Rescript Opinion): The Governor's motion to dismiss the complaint is allowed. The parole board's motion is allowed only with respect to the claims of the individuals civilly committed under G. L. c. 123, § 35, and is otherwise denied. (By the Court)   |
| 06/02/2020     | RESCRIPTS ISSUED to trial court.  |

As of 09/21/2020 10:20am

## 2084CV00855 Foster, Stephen et al vs. Carol Mici, Commissioner of the Massachusetts Department of Correction et al

- Case Type:
- Equitable Remedies
- Case Status:
- Open
- File Date
- 04/21/2020
- DCM Track:
- A - Average
- Initiating Action:
- Declaratory Judgment G.L. c. 231A
- Status Date:
- 04/21/2020
- Case Judge:
- Next Event:
- 

[All Information](#) [Party](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

### Docket Information

| <a href="#">Docket Date</a> | <i>Docket Text</i>  | <a href="#">File Ref Nbr.</a> | <i>Image Avail.</i> |
|-----------------------------|---|-------------------------------|---------------------|
| 04/21/2020                  | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Stephen Foster        |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Stephen Foster          |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Stephen Foster   |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Stephen Foster             |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Stephen Foster          |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Michael Gomes         |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Michael Gomes           |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Michael Gomes    |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Michael Gomes              |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Michael Gomes           |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Peter Kyriakides      |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Peter Kyriakides        |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Peter Kyriakides |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Peter Kyriakides           |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Peter Kyriakides        |                               |                     |
| 04/21/2020                  | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Richard O'Rourke      |                               |                     |

| <a href="#">Docket Date</a> | <a href="#">Docket Text</a>  | <a href="#">File Ref Nbr.</a> | <a href="#">Image Avail.</a> |
|-----------------------------|--|-------------------------------|------------------------------|
| 04/21/2020                  | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Richard O'Rourke         |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Richard O'Rourke  |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Richard O'Rourke            |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Richard O'Rourke         |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Steven Paladino        |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Steven Paladino          |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Steven Paladino   |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Steven Paladino             |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Steven Paladino          |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Mark Santos            |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Mark Santos              |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Mark Santos       |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Mark Santos                 |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Mark Santos              |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff David Sibinich         |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff David Sibinich           |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff David Sibinich    |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff David Sibinich              |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff David Sibinich           |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Michelle Tourigny      |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Michelle Tourigny        |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Michelle Tourigny |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Michelle Tourigny           |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Michelle Tourigny        |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Michael White          |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Michael White            |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Michael White     |                               |                              |
| 04/21/2020                  | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Michael White               |                               |                              |

| <u>Docket Date</u> | <u>Docket Text</u>   | <u>File Ref Nbr.</u> | <u>Image Avail.</u>   |
|--------------------|--|----------------------|-----------------------|
| 04/21/2020         | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Michael White  |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Frederick Yeomans  |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Frederick Yeomans  |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Frederick Yeomans   |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Frederick Yeomans   |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Frederick Yeomans  |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date Elizabeth D Matos, Esq. added for Plaintiff Hendrick Davis   |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date James R Pingeon, Esq. added for Plaintiff Hendrick Davis   |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date Bonita Pia Tenneriello, Esq. added for Plaintiff Hendrick Davis  |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date David Milton, Esq. added for Plaintiff Hendrick Davis  |                      |                       |
| 04/21/2020         | Attorney appearance<br>On this date Michael Horrell, Esq. added for Plaintiff Hendrick Davis   |                      |                       |
| 04/21/2020         | Case assigned to:<br>DCM Track A - Average was added on 04/21/2020   |                      |                       |
| 04/21/2020         | ORDER: Reservation and Report & Interim Order<br>(See entire Order Transferring Case from Supreme Judicial Court attached) (Elspeth B. Cypher, Associate Justice)  | 1                    | <a href="#">Image</a> |
| 04/21/2020         | ORDER: Order of Designation<br>Pursuant to the Reservation and Report and Interim Order issued by the single justice in Supreme Judicial Court for Suffolk County No. SJ-2020-0212, docketed in the Supreme Judicial Court for the Commonwealth as SJC-12935, I hereby designate the Honorable Robert L. Ullmann, Associate Justice of the Superior Court, to conduct the proceedings and make findings as set forth in that order. The Office of the Clerk of the Superior Court for Suffolk County for Civil Business with enter this matter on its docket and notify all counsel of record. Dated 4/20/2020 | 2                    |                       |
| 04/21/2020         | Original civil complaint filed.  | 3                    | <a href="#">Image</a> |
| 04/21/2020         | Certificate of service of attorney or Pro Se:<br><br>Bonita Pia Tenneriello, Esq.  | 4                    | <a href="#">Image</a> |
| 04/21/2020         | Plaintiff(s) Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sabinich, Michelle Tourigny, Michael White, Frederick Yeomans, Hendrick Davis's EMERGENCY Motion for a Preliminary Injunction  | 5                    | <a href="#">Image</a> |
| 04/21/2020         | Plaintiff Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sabinich, Michelle Tourigny, Michael White, Frederick Yeomans, Hendrick Davis's Memorandum in Support of Their Motion for Preliminary Injunction  | 6                    | <a href="#">Image</a> |
| 04/21/2020         | ORDER: Notice of Evidentiary Hearing and Pre Hearing Requirements<br>(see P#7 for full Order) (dated 4/21/20)  | 7                    | <a href="#">Image</a> |
| 04/27/2020         | Affidavit of Jennifer Gaffney  | 8                    | <a href="#">Image</a> |
| 04/27/2020         | Affidavit of Superintendent of Hampden County Sheriff's Department   | 9                    | <a href="#">Image</a> |
| 04/27/2020         | Affidavit of Carol Mici  | 10                   | <a href="#">Image</a> |
| 04/27/2020         | Plaintiff Stephen Foster's Submission of<br>Statement of Agreed Facts Between Plaintiffs and Department of Correction (submitted by all parties)   | 11                   | <a href="#">Image</a> |
| 04/27/2020         | Plaintiffs Stephen Foster's Statement of<br>Facts Not Agreed to by Governor Baker (submitted by all plaintiffs )   | 12                   | <a href="#">Image</a> |

| <u>Docket Date</u> | <u>Docket Text</u>   | <u>File Ref Nbr.</u> | <u>Image Avail.</u>   |
|--------------------|--|----------------------|-----------------------|
| 04/27/2020         | Habeas corpus issued as to Michelle Tourigny at MCI - Framingham for 04/27/2020 09:00 AM Evidentiary Hearing. *** INMATE TO APPEAR FOR EVIDENTIARY HEARING AT 3:00PM 4/27/20<br><br>***THIS IS A VIDEO CONFERENCE TO BE HELD THROUGH THE VIDEO CONFERENCING FACILITIES OF THE DEPARTMENT OF CORRECTION.<br><br>Judge: Ullmann, Hon. Robert L   |                      |                       |
| 04/27/2020         | Habeas corpus issued as to Dana Durfee at MCI - Gardner for 04/28/2020 09:30 AM Evidentiary Hearing. ***INMATE TO APPEAR FOR EVIDENTIARY HEARING AT 11:30AM<br><br>***THIS IS A VIDEO CONFERENCE TO BE HELD THROUGH THE VIDEO CONFERENCING FACILITIES OF THE DEPARTMENT OF CORRECTION<br><br>Judge: Ullmann, Hon. Robert L   |                      |                       |
| 04/27/2020         | Habeas corpus issued as to Stephen Foster at Old Colony Correctional Center for 04/28/2020 09:30 AM Evidentiary Hearing. ***INMATE TO APPEAR FOR EVIDENTIARY HEARING AT 1:30pm<br><br>***THIS IS A VIDEO CONFERENCE TO BE HELD THROUGH THE VIDEO CONFERENCING FACILITIES OF THE DEPARTMENT OF CORRECTION<br><br>Judge: Ullmann, Hon. Robert L  |                      |                       |
| 04/27/2020         | Habeas corpus issued as to Ariel Pena at MCI - Shirley for 04/28/2020 09:30 AM Evidentiary Hearing. ***INMATE TO APPEAR FOR EVIDENTIARY HEARING AT 2:00PM<br><br>***THIS IS A VIDEO CONFERENCE TO BE HELD THROUGH THE VIDEO CONFERENCING FACILITIES OF THE DEPARTMENT OF CORRECTION<br><br>Judge: Ullmann, Hon. Robert L   |                      |                       |
| 04/27/2020         | Affidavit of James Ferreira  | 13                   | <a href="#">Image</a> |
| 04/27/2020         | Attorney appearance<br>On this date Stephen G Dietrick, Esq. added for Defendant Carol Mici, Commissioner of the Massachusetts Department of Correction  |                      |                       |
| 04/27/2020         | Attorney appearance<br>On this date Stephen G Dietrick, Esq. added for Defendant Thomas Turco, Secretary of the Executive Office of Public Safety and Security   |                      |                       |
| 04/27/2020         | Received from<br>Defendant Carol Mici, Commissioner of the Massachusetts Department of Correction and Thomas Turco, Secretary of Executive Office of Public Safety : Answer to original complaint;   | 14                   | <a href="#">Image</a> |
| 04/27/2020         | Attorney appearance<br>On this date Ryan McManus, Esq. added for Defendant Charles Baker, Governor of the Commonwealth of Massachusetts  |                      |                       |
| 04/27/2020         | Attorney appearance<br>On this date Michael P Moore, Jr., Esq. added for Defendant Charles Baker, Governor of the Commonwealth of Massachusetts  |                      |                       |
| 04/27/2020         | Attorney appearance<br>On this date Vanessa Azniv Arslanian, Esq. added for Defendant Charles Baker, Governor of the Commonwealth of Massachusetts   |                      |                       |
| 04/27/2020         | Affidavit of Sean Medeiros   | 15                   | <a href="#">Image</a> |
| 04/27/2020         | Defendant Carol Mici, Commissioner of the Massachusetts Department of Correction's Submission of Exhibits 1-23 Filed by Department of Correction   | 16                   | <a href="#">Image</a> |
| 04/27/2020         | Plaintiff Stephen Foster's Statement of Facts Not Agreed to by the Department of Correction (filed by all plaintiffs)  | 17                   | <a href="#">Image</a> |
| 04/27/2020         | Party(s) file Stipulation<br>as to Facts Agreed Between the Plaintiffs and the Governor<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sibirich, David (Plaintiff); White, Michael (Plaintiff); Davis, Hendrick (Plaintiff); Charles Baker, Governor of the Commonwealth of Massachusetts (Defendant) | 18                   | <a href="#">Image</a> |

| <a href="#">Docket Date</a> | <a href="#">Docket Text</a>  | <a href="#">File Ref Nbr.</a> | <a href="#">Image Avail.</a> |
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| 04/27/2020                  | Party(s) file Stipulation as to Facts Agreed Between the Plaintiffs and the Chairperson of the Massachusetts Parole Board<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sabinich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Yeomans, Frederick (Plaintiff); Davis, Hendrick (Plaintiff); Gloriann Moroney, Chair Massachusetts Parole Board (Defendant) | 19                            | <a href="#">Image</a>        |
| 04/27/2020                  | Attorney appearance<br>On this date Pamela A Murphy, Esq. added for Defendant Gloriann Moroney, Chair Massachusetts Parole Board   |                               |                              |
| 04/27/2020                  | Event Result:: Evidentiary Hearing scheduled on:<br>04/27/2020 09:00 AM<br>Has been: Held as Scheduled<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                               |                              |
| 04/28/2020                  | Event Result:: Evidentiary Hearing scheduled on:<br>04/28/2020 09:30 AM<br>Has been: Held as Scheduled<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                               |                              |
| 04/29/2020                  | Affidavit of Robert Peacock in Support of Preliminary Injunction   | 20                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Dr. Josiah Rich MD MPH in Support of Preliminary Injunction   | 21                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Yoav Golan MD in Support of Preliminary Injunction  | 22                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Victor Lewis MD in support of Preliminary Injunction  | 23                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Six Internal Medicine Residents and Attending Physicians at Boston Medical Center-Jordana Laks MD MPH, Samantha Siskind MD, Hannan Braun MD, Ricardo Cruz MD MPH, Catherine Rich MD, Jennifer Seigel MD   | 24                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Stephen G. Foster in Support of Preliminary Injunction  | 25                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Michael Gomes in Support of Preliminary Injunction  | 26                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Peter Kyriakides in support of Preliminary Injunction   | 27                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Richard O'Rourke in Support of Preliminary Injunction   | 28                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Steven Palladino in Support of Preliminary Injunction   | 29                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Mark Santos in Support of Preliminary Injunction  | 30                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of David Sabinich in Support of Preliminary Injunction   | 31                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Michelle Tourigny in Support of Preliminary Injunction  | 32                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Michael White in Support of Preliminary Injunction  | 33                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Frederick Yeomans in Support of Preliminary Injunction  | 34                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Hendrick Davis in Support of Preliminary Injunction   | 35                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Todd Cummins in Support of Preliminary Injunction   | 36                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Ryan Duntin in Support of Preliminary Injunction  | 37                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Dana Durfee in Support of Preliminary Injunction  | 38                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Gabriel Guzman in Support of Preliminary Injunction   | 39                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Michael Maramaldi in Support of Preliminary Injunction  | 40                            | <a href="#">Image</a>        |
| 04/29/2020                  | Affidavit of Tevon Ngomba in Support of Preliminary Injunction   | 41                            | <a href="#">Image</a>        |



| <u>Docket Date</u> | <u>Docket Text</u>   | <u>File Ref Nbr.</u> | <u>Image Avail.</u>   |
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| 04/29/2020         | Affidavit of Ariel Pena in Support of Preliminary Injunction   | 42                   | <a href="#">Image</a> |
| 04/29/2020         | Affidavit of Ryan Powell in Support of Preliminary Injunction  | 43                   | <a href="#">Image</a> |
| 04/29/2020         | Affidavit of Joseph Watkins in Support of Preliminary Injunction   | 44                   | <a href="#">Image</a> |
| 04/29/2020         | Affidavit of Noe Zuniga in Support of Preliminary Injunction   | 45                   | <a href="#">Image</a> |
| 04/29/2020         | Affidavit of Carol Mici Commissioner of Corrections  | 46                   | <a href="#">Image</a> |
| 04/29/2020         | Affidavit of Catherine Hinton Esq. Respecting Parole Board Prerequisites Blocking Actual Parole Release of Previously-Approved Individuals during COVID-19 Pandemic  | 47                   | <a href="#">Image</a> |
| 04/29/2020         | Affidavit of Eleanor Umphres Esq.  | 48                   | <a href="#">Image</a> |
| 04/29/2020         | Event Result:: Evidentiary Hearing scheduled on:<br>04/29/2020 09:30 AM<br>Has been: Held as Scheduled<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                      |                       |
| 04/30/2020         | Affidavit of Gloriann Moroney, Chair of Massachusetts Parole Board   | 49                   | <a href="#">Image</a> |
| 04/30/2020         | Affidavit of of Carol Mici   | 50                   | <a href="#">Image</a> |
| 04/30/2020         | Affidavit of Michael J Horrell in support of Plaintiffs Emergency Motion for Preliminary Injunctive Relief   | 51                   | <a href="#">Image</a> |
| 04/30/2020         | Event Result:: Hearing on Preliminary Injunction scheduled on:<br>04/30/2020 03:00 PM<br>Has been: Held as Scheduled<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                      |                       |
| 05/01/2020         | Findings of Fact and Rulings of Law:<br><br>FINDINGS OF FACT OF THE SUPERIOR COURT : For full ORDER see P#52. Dated 05/01/2020. Notice Sent Via email 05/01/2020.<br><br>Judge: Ullmann, Hon. Robert L   | 52                   | <a href="#">Image</a> |
| 06/09/2020         | ORDER: procedural order<br><br>Judge: Ullmann, Hon. Robert L   | 53                   |                       |
| 06/11/2020         | Event Result:: Conference to Review Status scheduled on:<br>06/12/2020 10:00 AM<br>Has been: Rescheduled For the following reason: Joint request of parties<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate  |                      |                       |
| 06/17/2020         | ORDER: Procedural Order<br>See Page #54 For full detail<br><br>Notice Sent Via Email on 6/9/20   | 54                   | <a href="#">Image</a> |
| 06/18/2020         | General correspondence regarding Decision and Order from SJC SJ-2020-0212<br>It is ORDERED that: The motion for Preliminary Injunction is denied. The Matter is transferred to the Superior Court where litigation on the complaint shall proceed as an emergency matter, with due speed in consideration of the circumstances, before the same Superior Court Judge who was designated to make findings of fact with respect to the motion for a preliminary injunction. In addition to rulings on the merits, the judge shall resolve all questions of class certification, including any amendment of the complaint or substitution of parties (dated 6/2/20) | 55                   | <a href="#">Image</a> |
| 06/18/2020         | General correspondence regarding Decision and Order from SJC in SJ-2020-0212<br>It is ORDERED that: The Governor's motion to dismiss the complaint is allowed. The parole board's motion is allowed only with respect to the claims of the individuals civilly committed under GLc. 123 sec 35, and is otherwise denied. (dated 6/2/20)  | 56                   | <a href="#">Image</a> |
| 06/19/2020         | Received from<br>Defendant Gloriann Moroney, Chair Massachusetts Parole Board: Answer with claim for trial by jury; (filed on 6/17/20)   | 57                   |                       |

| <u>Docket Date</u> | <u>Docket Text</u>  | <u>File Ref Nbr.</u> | <u>Image Avail.</u>   |
|--------------------|---|----------------------|-----------------------|
| 06/19/2020         | Event Result:: Conference to Review Status scheduled on: 06/19/2020 10:00 AM<br>Has been: Held via Video Conference<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                      |                       |
| 06/29/2020         | Defendant Charles Baker, Governor of the Commonwealth of Massachusetts's Assented to Motion for Separate and Final Judgment: ALLOWED (dated 6/19/20) notice sent 6/24/20  | 58                   | <a href="#">Image</a> |
| 06/29/2020         | ORDER: Procedural and Case Tracking Order (see P#59 (dated 6/19/20) notice sent 6/24/20)  | 59                   | <a href="#">Image</a> |
| 07/01/2020         | JUDGMENT OF DISMISSAL There is no just reason for delay It is hereby Ordered and Adjudged That Judgment enters dismissing all claims against deft Governor Charles D Baker entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)<br><br>Judge: Ullmann, Hon. Robert L  | 60                   | <a href="#">Image</a> |
| 08/11/2020         | Attorney appearance<br>On this date Pro Se added for Other interested party John E. Dutcher   |                      |                       |
| 08/11/2020         | Other Interested Party John E. Dutcher's Motion to intervene (with Memorandum of law in Support thereof)  | 61                   | <a href="#">Image</a> |
| 08/21/2020         | Endorsement on Motion to intervene (#61.0): Other action taken any party may file a response to this motion by 9/14/20;<br><br>(dated 8/12/20) notice sent 8/14/20<br><br>Judge: Ullmann, Hon. Robert L   |                      |                       |
| 08/26/2020         | Plaintiffs Stephen Foster's Motion for Class Certification; Memorandum in Support of<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sibirich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Yeomans, Frederick (Plaintiff); Davis, Hendrick (Plaintiff)       | 62                   | <a href="#">Image</a> |
| 08/26/2020         | Plaintiffs Stephen Foster's Declaration of Yoav Golan, M.D.<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sibirich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Yeomans, Frederick (Plaintiff); Davis, Hendrick (Plaintiff)                                | 63                   | <a href="#">Image</a> |
| 08/26/2020         | Opposition to Plaintiffs' Motion (P#62) for Class Certification filed by Carol Mici, Commissioner of the Massachusetts Department of Correction, Thomas Turco, Secretary of the Executive Office of Public Safety and Security  | 64                   | <a href="#">Image</a> |
| 08/26/2020         | Stephen Foster's Reply Memorandum in support of Plaintiffs' Motion for Class Certification<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sibirich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Yeomans, Frederick (Plaintiff); Davis, Hendrick (Plaintiff) | 65                   | <a href="#">Image</a> |
| 09/11/2020         | Opposition to John E. Dutcher's Motion (P#61) to Intervene Pursuant to Mass. R. Civ. P. 24(a) and (b) filed by Thomas Turco, Secretary of the Executive Office of Public Safety and Security, Carol Mici, Commissioner of the Massachusetts Department of Correction  | 66                   | <a href="#">Image</a> |
| 09/18/2020         | Event Result:: Conference to Review Status scheduled on: 09/18/2020 05:00 AM<br>Has been: Held as Scheduled<br>Hon. Gregg J Pasquale, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                      |                       |
| 09/21/2020         | Plaintiff Stephen Foster's Motion for an Enlargement of Time  | 67                   | <a href="#">Image</a> |
| 09/28/2020         | Endorsement on Motion for an Enlargement of Time (#67.0): ALLOWED (9/23/20) Allowed No finding of wrongdoing by defendants Notice 9/25/20   |                      | <a href="#">Image</a> |
| 09/29/2020         | Other Interested Party John E. Dutcher's Response of Rebuttal to Defendant's Opposition (P#66) to John E. Dutcher's Motion to Intervene   | 68                   | <a href="#">Image</a> |



| <a href="#">Docket Date</a> | <a href="#">Docket Text</a>  | <a href="#">File Ref Nbr.</a> | <a href="#">Image Avail.</a> |
|-----------------------------|--|-------------------------------|------------------------------|
| 10/01/2020                  | Event Result:: Hearing on Class Action Certification scheduled on: 10/01/2020 03:00 PM<br>Has been: Held via Video Conference<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate  |                               |                              |
| 10/09/2020                  | Event Result:: Conference to Review Status scheduled on: 10/09/2020 05:00 AM<br>Has been: Held as Scheduled<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate  |                               |                              |
| 10/16/2020                  | Endorsement on Motion to intervene (#61.0): DENIED for the reasons set forth in Section II of defendants opposition brief, see docket #66 at 3-4. the court further notes that, if the motion of current plaintiffs in this case is granted, Mr. Dutcher will be a member of both the certified class and subclass.<br><br>(dated 10/6/20) notice sent 10/15/20  |                               | <a href="#">Image</a>        |
| 10/26/2020                  | Request for hearing filed<br><br>On motion for class certification<br>Filed 10/21/20<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sabinich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Yeomans, Frederick (Plaintiff); Davis, Hendrick (Plaintiff); Tenneriello, Esq., Bonita Pia (Attorney) on behalf of Davis, Hendrick, Foster, Stephen, Gomes, Michael, Kyriakides, Peter, O'Rourke, Richard, Paladino, Steven, Santos, Mark, Sabinich, David, Tourigny, Michelle, White, Michael, Yeomans, Frederick (Plaintiff) | 69                            | <a href="#">Image</a>        |
| 10/30/2020                  | Plaintiffs Stephen Foster's EMERGENCY Motion to Require Defendant MICI to Establish a Home Confinement Program; and Memorandum in Support of Emergency Motion<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sabinich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Yeomans, Frederick (Plaintiff); Davis, Hendrick (Plaintiff)   | 70                            | <a href="#">Image</a>        |
| 10/30/2020                  | Suggestion of death of Plaintiff Steven Palladino filed:<br><br>Applies To: Horrell, Esq., Michael (Attorney) on behalf of Paladino, Steven (Plaintiff)  | 71                            | <a href="#">Image</a>        |
| 11/06/2020                  | Matter taken under advisement: Hearing on Class Action Certification scheduled on: 11/06/2020 12:00 PM<br>Has been: Held - Under advisement<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate  |                               |                              |
| 11/09/2020                  | Plaintiff Stephen Foster's Assented to Motion to Extend Discovery and all Case Event Deadlines   | 72                            | <a href="#">Image</a>        |
| 11/10/2020                  | Opposition to to Plaintiffs' Emergency Motion filed by Thomas Turco, Secretary of the Executive Office of Public Safety and Security, Carol Mici, Commissioner of the Massachusetts Department of Correction to Plaintiff's Emergency Motion to Require Establishment of Home Confinement Program  | 73                            | <a href="#">Image</a>        |
| 11/12/2020                  | Endorsement on Motion for Class Certification; (#62.0): ALLOWED to the extent set forth in the memorandum of decision and order.   |                               | <a href="#">Image</a>        |
| 11/12/2020                  | MEMORANDUM & ORDER:<br><br>on plaintiffs' motion for Class Certification; motion is ALLOWED (docket entry No. 62)<br><br>Judge: Ullmann, Hon. Robert L   | 74                            | <a href="#">Image</a>        |
| 11/16/2020                  | Endorsement on Motion to to Extend Discovery and all Case Event Deadlines (#72.0): ALLOWED (date 11/16/20) Allowed Notice 11/13/20   |                               | <a href="#">Image</a>        |
| 11/19/2020                  | Stephen Foster's Reply Memorandum in support of plaintiff's motion to establish a home confinement program<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sabinich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Yeomans, Frederick (Plaintiff); Davis, Hendrick (Plaintiff)  | 75                            | <a href="#">Image</a>        |

| <a href="#">Docket Date</a> | <a href="#">Docket Text</a>   | <a href="#">File Ref Nbr.</a> | <a href="#">Image Avail.</a> |
|-----------------------------|---|-------------------------------|------------------------------|
| 11/19/2020                  | Event Result:: Motion Hearing scheduled on: 11/19/2020 10:00 AM<br>Has been: Held via Video Conference<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate  |                               |                              |
| 12/01/2020                  | Defendant Carol Mici, Commissioner of the Massachusetts Department of Correction, Thomas Turco, Secretary of the Executive Office of Public Safety and Security's Notice of Status Report on the Implementation of a Home Confinement Program   | 76                            | <a href="#">Image</a>        |
| 12/02/2020                  | Event Result:: Motion Hearing scheduled on: 12/02/2020 10:00 AM<br>Has been: Not Held For the following reason: Converted to status conference<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate  |                               |                              |
| 12/04/2020                  | Plaintiffs Stephen Foster's Response to defendants' status report on the implantation of a home confinement program.<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sibirich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Yeomans, Frederick (Plaintiff); Davis, Hendrick (Plaintiff)   | 77                            | <a href="#">Image</a>        |
| 12/07/2020                  | Defendants Carol Mici, Commissioner of the Massachusetts Department of Correction, Thomas Turco, Secretary of the Executive Office of Public Safety and Security's Response to Plaintiff's Response to Defendants' Status Report on the Implementation of a Home Confinement Program  | 78                            | <a href="#">Image</a>        |
| 12/08/2020                  | Event Result:: Motion Hearing scheduled on: 12/08/2020 10:00 AM<br>Has been: Held via Video Conference<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate  |                               |                              |
| 12/14/2020                  | Plaintiffs Stephen Foster's Supplemental, Memorandum in Support of Plaintiffs' Emergency Motion for an Order Requiring Commissioner Mici to Establish a Home Confinement Program<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sibirich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Yeomans, Frederick (Plaintiff); Davis, Hendrick (Plaintiff) | 79                            | <a href="#">Image</a>        |
| 12/16/2020                  | Reply/Sur-reply<br><br>Defendants Opposition to Plaintiffs Supplemental Memorandum in Support of Motion<br><br>Applies To: Carol Mici, Commissioner of the Massachusetts Department of Correction (Defendant); Thomas Turco, Secretary of the Executive Office of Public Safety and Security (Defendant); Dietrick, Esq., Stephen G (Attorney) on behalf of Carol Mici, Commissioner of the Massachusetts Department of Correction, Thomas Turco, Secretary of the Executive Office of Public Safety and Security (Defendant)           | 80                            | <a href="#">Image</a>        |
| 12/17/2020                  | Reply/Sur-reply<br><br>Letter to Honorable Robert Ullmann by Defendants.<br><br>Applies To: Carol Mici, Commissioner of the Massachusetts Department of Correction (Defendant); Thomas Turco, Secretary of the Executive Office of Public Safety and Security (Defendant)   |                               | <a href="#">Image</a>        |
| 12/21/2020                  | General correspondence regarding Motion to Intervene and to Supplement the Factual Record with the Attached Affidavit<br>(Filed by Anthony Barry, Filed 12/15/2020)   | 81                            | <a href="#">Image</a>        |
| 12/24/2020                  | Plaintiff Stephen Foster's Motion for Enlargement of the Page Limit for their Memorandum in Support of the Plaintiff's Emergency Motion for Preliminary Injunction (All Plaintiffs')  | 82                            | <a href="#">Image</a>        |
| 12/24/2020                  | Plaintiff(s) Stephen Foster, Michael Gomes, Peter Kyriakides, Richard O'Rourke, Steven Paladino, Mark Santos, David Sibirich, Michelle Tourigny, Michael White, Frederick Yeomans, Hendrick Davis's EMERGENCY Motion for a Preliminary Injunction   | 83                            | <a href="#">Image</a>        |
| 12/24/2020                  | Stephen Foster's Memorandum in support of EMERGENCY Motion for a Preliminary Injunction (All Plaintiffs)  | 84                            | <a href="#">Image</a>        |
| 12/24/2020                  | Exhibits/Appendix   | 85                            | <a href="#">Image</a>        |
| 12/30/2020                  | Endorsement on Motion to Require Defendant MICI to Establish a Home Confinement Program; and Memorandum in Support of Emergency Motion (#70.0): DENIED<br>(date 12/18/20) Denied See memorandum of decision and order notice 12/24/20   |                               | <a href="#">Image</a>        |

| <u>Docket Date</u> | <u>Docket Text</u>   | <u>File Ref Nbr.</u> | <u>Image Avail.</u>   |
|--------------------|--|----------------------|-----------------------|
| 12/30/2020         | MEMORANDUM & ORDER:<br><br>On Plaintiffs Motion for Order Requiring Implementation of Home Confinement Program<br><br>Motion is Denied<br><br>Judge: Ullmann, Hon. Robert L  | 86                   | <a href="#">Image</a> |
| 01/07/2021         | Defendants Carol Mici, Commissioner of the Massachusetts Department of Correction, Thomas Turco, Secretary of the Executive Office of Public Safety and Security's Motion to Enlarge Time to Respond to Plaintiff's Motion for Preliminary Injunction                  | 87                   | <a href="#">Image</a> |
| 01/07/2021         | Defendant Gloriann Moroney, Chair Massachusetts Parole Board's Motion to Join and Adopt Co-Defendants' Motion to Enlarge   | 88                   | <a href="#">Image</a> |
| 01/07/2021         | Opposition to to Defendants' Motion to Enlarge and Request for Emergency Hearing filed by  | 89                   | <a href="#">Image</a> |
| 01/08/2021         | Defendant Carol Mici, Commissioner of the Massachusetts Department of Correction's Submission of Status Report on Establishment of a Home Confinement Program  | 90                   | <a href="#">Image</a> |
| 01/12/2021         | Endorsement on Motion to intervene 12/29/20 DENIED as moot. Mr. Barry is already a member of the class in this case. Ullman, J. (#81.0): DENIED  |                      | <a href="#">Image</a> |
| 01/13/2021         | ORDER: Order on Defendants' Motion for Additional Time to Respond to Plaintiffs' Second Emergency Motion for Preliminary Injunction (see P#91)   | 91                   | <a href="#">Image</a> |
| 01/15/2021         | Event Result:: Conference to Review Status scheduled on:<br>01/19/2021 05:00 AM<br>Has been: Canceled For the following reason: By Court prior to date<br>Hon. Heidi Brieger, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate                    |                      |                       |
| 01/15/2021         | Endorsement on Motion for Enlargement of the Page Limit for their Memorandum in Support of the Plaintiff's Emergency Motion for Preliminary Injunction (All Plaintiffs') (#82.0): ALLOWED (dated 1/05/21) notice sent 1/15/21  |                      | <a href="#">Image</a> |
| 01/21/2021         | Exhibits/Appendix<br><br>Plaintiff's submission of Corrected Declarations (Exhibits to Paper No. 84)   | 92                   | <a href="#">Image</a> |
| 01/22/2021         | Opposition to to Plaintiffs' Emergency Motion for Preliminary Injunction filed by Gloriann Moroney, Chair Massachusetts Parole Board   | 93                   | <a href="#">Image</a> |
| 01/22/2021         | Opposition to plaintiffs' emergency motion for Preliminary Injunction filed by Gloriann Moroney, Chair Massachusetts Parole Board  | 94                   | <a href="#">Image</a> |
| 01/22/2021         | Opposition to plaintiffs' emergency motion for preliminary injunction filed by Thomas Turco, Secretary of the Executive Office of Public Safety and Security, Carol Mici, Commissioner of the Massachusetts Department of Correction                                   | 95                   | <a href="#">Image</a> |
| 01/22/2021         | Affidavit<br><br>of Carol MCI<br><br>Applies To: Carol Mici, Commissioner of the Massachusetts Department of Correction (Defendant)  | 96                   | <a href="#">Image</a> |
| 01/22/2021         | Exhibits/Appendix<br><br>filed with opposition filed by Turco and MCI<br><br>Applies To: Carol Mici, Commissioner of the Massachusetts Department of Correction (Defendant); Thomas Turco, Secretary of the Executive Office of Public Safety and Security (Defendant) |                      | <a href="#">Image</a> |
| 01/25/2021         | Plaintiff-Intervenor Anthony Barry's Motion for an order directing counsel for the plaintiff's to examine the court's civil rights ruling. ; DENIED (dated 12/29/2020) notice sent 01/07/2021 filed on (01/07/2021)  | 97                   | <a href="#">Image</a> |
| 01/27/2021         | Reply/Sur-reply<br><br>Plaintiffs' reply and supplemental memorandum regarding New Legislation requiring Covid-19 releases from prison.  | 98                   | <a href="#">Image</a> |

| <a href="#">Docket Date</a> | <a href="#">Docket Text</a>   | <a href="#">File Ref Nbr.</a> | <a href="#">Image Avail.</a> |
|-----------------------------|---|-------------------------------|------------------------------|
| 01/27/2021                  | Event Result:: Hearing on Preliminary Injunction scheduled on: 01/27/2021 03:00 PM<br>Has been: Canceled For the following reason: By Court prior to date<br>Hon. Heidi Brieger, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate              |                               |                              |
| 01/27/2021                  | Event Result:: Conference to Review Status scheduled on: 01/27/2021 03:00 PM<br>Has been: Held as Scheduled<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                               |                              |
| 02/04/2021                  | Reply/Sur-reply<br><br>Reply of Defendants Thomas Turco and Carol Mici to Plaintiffs' Response to Defendants' Opposition to Emergency Motion for Injunctive Relief  | 99                            | <a href="#">Image</a>        |
| 02/04/2021                  | Affidavit<br><br>Supplemental Affidavit of Carol Mici   | 100                           | <a href="#">Image</a>        |
| 02/05/2021                  | Event Result:: Conference to Review Status scheduled on: 02/05/2021 05:00 AM<br>Has been: Held as Scheduled<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                               |                              |
| 02/10/2021                  | Reply/Sur-reply<br><br>Further Memorandum in support of plaintiff's emergency motion for injunctive relief  |                               | <a href="#">Image</a>        |
| 02/10/2021                  | Reply/Sur-reply<br><br>Further Memorandum in support of plaintiff's emergency motion for injunctive relief<br><br>MOTION FOR ENLARGEMENT OF THE PAGE LIMIT<br>FOR PLAINTIFFS' FURTHER MEMORANDUM IN SUPPORT OF THEIR<br>EMERGENCY MOTION FOR PRELIMINARY INJUNCTION | 101                           | <a href="#">Image</a>        |
| 02/10/2021                  | Event Result:: Hearing on Preliminary Injunction scheduled on: 02/10/2021 03:15 PM<br>Has been: Held via Video/Teleconference<br>Hon. Robert L Ullmann, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate                                       |                               |                              |
| 02/17/2021                  | General correspondence regarding request from Bodhisattva Skandha   | 102                           |                              |
| 02/17/2021                  | Endorsement on Motion for emergency preliminary injunction (#83.0): DENIED<br>see memorandum of decision and order.   |                               | <a href="#">Image</a>        |
| 02/18/2021                  | Plaintiffs Stephen Foster's Motion to Amend Complaint   | 103                           | <a href="#">Image</a>        |
| 02/18/2021                  | Exhibits/Appendix<br><br>Plaintiff's Proposed Amended Complaint   |                               | <a href="#">Image</a>        |
| 02/18/2021                  | Exhibits/Appendix<br><br>Plaintiffs' Proposed Amended Complaint- Draft  |                               | <a href="#">Image</a>        |
| 02/25/2021                  | MEMORANDUM & ORDER:<br><br>on plaintiffs' second motion for preliminary injunction.; motion is DENIED.<br><br>(dated 2/17/21)<br><br>Judge: Ullmann, Hon. Robert L  | 104                           | <a href="#">Image</a>        |
| 02/25/2021                  | Defendant Thomas Turco, Secretary of the Executive Office of Public Safety and Security, Carol Mici, Commissioner of the Massachusetts Department of Correction's EMERGENCY Motion for Protective Order, and to Stay Discovery                                      | 105                           | <a href="#">Image</a>        |
| 02/26/2021                  | Defendant Gloriann Moroney, Chair Massachusetts Parole Board's EMERGENCY Motion for Protective Order and to Stay Discovery  | 106                           | <a href="#">Image</a>        |

| <a href="#">Docket Date</a> | <a href="#">Docket Text</a>   | <a href="#">File Ref Nbr.</a> | <a href="#">Image Avail.</a> |
|-----------------------------|---|-------------------------------|------------------------------|
| 03/01/2021                  | Endorsement on Notice of Appearance (#102.0): DENIED<br>Mr. Skandha is a class member and must be represented by Class Counsel.   |                               | <a href="#">Image</a>        |
| 03/02/2021                  | Opposition to to Emergency Motion for a Protective Order and to Stay Discovery filed by Stephen Foster(plaintiffs)  | 107                           | <a href="#">Image</a>        |
| 03/03/2021                  | Endorsement on Motion for Protective Order, and to Stay Discovery (#105.0): Other action taken<br>Hearing to be held the week of March 8, 2021. All depositions stayed pending hearing. Notice sent by email 03/03/2021.  |                               | <a href="#">Image</a>        |
| 03/03/2021                  | Endorsement on Motion for Protective Order and to Stay Discovery (#106.0): Other action taken<br>Hearing to be held the week of March 8, 2021. All depositions stayed pending hearing. Notice sent by email 03/03/2021.<br><br>Judge: Ullmann, Hon. Robert L  |                               | <a href="#">Image</a>        |
| 03/03/2021                  | Opposition to PLAINTIFFS' MOTION TO AMEND COMPLAINT filed by DEFENDANTS' TURCO AND MICI   | 108                           | <a href="#">Image</a>        |
| 03/04/2021                  | Plaintiff Stephen Foster's Motion for Enlargement of Page Limit and Time to File Reply in Support of Motion to Amend Complaint  | 109                           | <a href="#">Image</a>        |
| 03/05/2021                  | Event Result:: Hearing for Protective Order scheduled on:<br>03/11/2021 09:00 AM<br>Has been: Rescheduled For the following reason: Request of Plaintiff<br>Hon. Heidi Brieger, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                               |                              |
| 03/12/2021                  | Endorsement on Motion for Enlargement of Page Limit (#109.0): ALLOWED<br>(dated 3/8/21) notice sent by email  |                               | <a href="#">Image</a>        |
| 03/16/2021                  | Reply/Sur-reply<br><br>Plaintiff's Reply Brief in Support of Motion to Amend Complaint  | 110                           | <a href="#">Image</a>        |
| 03/19/2021                  | Matter taken under advisement: Motion Hearing to Amend Complaint scheduled on:<br>03/19/2021 11:00 AM<br>Has been: Held - Under advisement<br>Hon. Heidi Brieger, Presiding<br>Staff:<br>Margaret M Buckley, Assistant Clerk Magistrate   |                               |                              |
| 03/26/2021                  | Notice of docket entry received from Appeals Court<br>Please take note that on March 26, 2021, the following entry was made on the docket of the above-referenced case: Petition pursuant to G.L. c. 231, s. 118 filed for Stephen Foster, Steven Palladino, Mark Santos, David Sibinich, Michelle Tourigny, Michael White, Frederick Yeomans, Hendrick Davis, Richard O'Rourke, Peter Kyriakides and Michael Gomes by Attorney David Milton.   | 111                           | <a href="#">Image</a>        |
| 03/29/2021                  | MEMORANDUM & ORDER:<br><br>On Plaintiffs Motion to Amended the Complaint and Defendants Motion for Protective Order<br><br>Plaintiffs motion to amend the complaint is ALLOWED. Emergency motion of defendants Turco and Mici for Protective Order, and to Stay Discovery is Denied, and Moot.<br><br>Judge: Ullmann, Hon. Robert L   | 112                           | <a href="#">Image</a>        |
| 03/29/2021                  | Party status:<br>Defendant Charles Baker, Governor of the Commonwealth of Massachusetts: Inactive;  |                               |                              |
| 03/29/2021                  | Amended: amended complaint filed by Stephen Foster<br><br>Applies To: Foster, Stephen (Plaintiff); Gomes, Michael (Plaintiff); Kyriakides, Peter (Plaintiff); O'Rourke, Richard (Plaintiff); Paladino, Steven (Plaintiff); Santos, Mark (Plaintiff); Sibinich, David (Plaintiff); Tourigny, Michelle (Plaintiff); White, Michael (Plaintiff); Davis, Hendrick (Plaintiff)   | 113                           | <a href="#">Image</a>        |
| 04/02/2021                  | Notice of docket entry received from Appeals Court<br>Please take note that on April 2, 2021, the following entry was made on the docket of the above-referenced case: ORDER: As no objections were filed in response to my 03/29/2021 order, pursuant to M.A.C. Rule 1.0 and Mass. R. Civ. P. 64(a), I reserve and report, without a decision, the plaintiffs' petition to a panel of this court for determination. The clerk's office shall assemble the record to include all documents filed herein and shall enter the appeal on the court's panel docket. See Mass. R.A.P. 5. The appeal shall be entered without the payment of further fees, and shall proceed in accordance with the Massachusetts Rules of Appellate Procedure including the filing of briefs and appendices. To the extent that any party seeks to expedite briefing in this matter, they may file an appropriate motion in the appeal. So ordered. (Meade, J.).<br>*Notice/Attest/Ullmann, J. | 114                           | <a href="#">Image</a>        |

| <a href="#">Docket Date</a> | <i>Docket Text</i>   | <a href="#">File Ref Nbr.</a> | <i>Image Avail.</i>   |
|-----------------------------|--|-------------------------------|-----------------------|
| 04/02/2021                  | Court received NOTICE OF ASSEMBLY OF THE RECORD Dear Counsel: The parties are hereby notified that the RECORD IS FULLY ASSEMBLED in the subject case in accordance with the Massachusetts Rules of Appellate Procedure (Mass.R.A.P Rule 9). Your attention is directed to the requirements of Mass.R.A.P. 10. Very truly yours, Joseph F. Stanton, Clerk related to appeal | 115                           | <a href="#">Image</a> |
|                             |  |                               |                       |



APPEALS COURT  
Single Justice  
Case Docket

STEPHEN FOSTER & others vs. CAROL MICI & others  
2021-J-0126

CASE HEADER

|                |                        |                   |                       |
|----------------|------------------------|-------------------|-----------------------|
| Case Status    | Disposed: Case Closed  | Status Date       | 04/02/2021            |
| Nature         | GLc 231, s 118, p 1    | Entry Date        | 03/26/2021            |
| Pet Role Below | Plaintiff              | Single Justice    | Meade, J.             |
| Brief Status   |                        | Brief Due         |                       |
| Case Type      | Civil                  | Lower Ct Number   |                       |
| Lower Court    | Suffolk Superior Court | Lower Court Judge | Robert L. Ullmann, J. |

INVOLVED PARTY

**Stephen Foster**  
Plaintiff/Petitioner

**Steven Palladino**  
Plaintiff

**Mark Santos**  
Plaintiff

**David Sibinich**  
Plaintiff

**Michelle Tourigny**  
Plaintiff

**Michael White**  
Plaintiff

**Frederick Yeomans**  
Plaintiff

**Hendrick Davis**  
Plaintiff

**Richard O'Rourke**  
Plaintiff

**Peter Kyriakides**  
Plaintiff

**Michael Gomes**  
Plaintiff

ATTORNEY APPEARANCE

[David Milton, Esquire](#)  
[Elizabeth D. Matos, Esquire](#)  
[James R. Pingeon, Esquire](#)  
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[Michael Horrell, Esquire](#)

[David Milton, Esquire](#)  
[Elizabeth D. Matos, Esquire](#)

**Carol Mici**  
Defendant/Respondent

**Gloriann Moroney**  
Defendant/Respondent

**Thomas Turco**  
Defendant/Respondent

**Baker Charles**  
Defendant/Respondent

**Ryan Duntin**  
Other/respondent

**Dana Durfee**  
Other/respondent

**Ariel Pena**  
Other/respondent

**John E. Dutcher**  
Other/respondent

**Anthony Barry**  
Other/respondent

[James R. Pingeon, Esquire](#)  
[Bonita Tenneriello, Esquire](#)  
[Michael Horrell, Esquire](#)  
[Stephen G. Dietrick, Esquire](#)

[Pamela Murphy, Esquire](#)

[Stephen G. Dietrick, Esquire](#)

[Vanessa Azniv Arslanian, Esquire](#)  
[Ryan P. McManus, Esquire](#)  
[M. Patrick Moore Jr., Esquire](#)

#### DOCKET ENTRIES

| Entry Date | Paper | Entry Text  |
|------------|-------|---|
| 03/26/2021 | #1    | Petition pursuant to G.L. c. 231, s. 118 filed for Stephen Foster, Steven Palladino, Mark Santos, David Sabinich, Michelle Tourigny, Michael White, Frederick Yeomans, Hendrick Davis, Richard O'Rourke, Peter Kyriakides and Michael Gomes by Attorney David Milton.   |
| 03/26/2021 | #2    | Memorandum of law in support filed for Stephen Foster, Steven Palladino, Mark Santos, David Sabinich, Michelle Tourigny, Michael White, Frederick Yeomans, Hendrick Davis, Richard O'Rourke, Peter Kyriakides and Michael Gomes by Attorney David Milton.   |
| 03/26/2021 | #3    | Appendix filed for Stephen Foster, Steven Palladino, Mark Santos, David Sabinich, Michelle Tourigny, Michael White, Frederick Yeomans, Hendrick Davis, Richard O'Rourke, Peter Kyriakides and Michael Gomes by Attorney David Milton.   |
| 03/26/2021 | #4    | Motion for leave to exceed word limit filed for Stephen Foster, Steven Palladino, Mark Santos, David Sabinich, Michelle Tourigny, Michael White, Frederick Yeomans, Hendrick Davis, Richard O'Rourke, Peter Kyriakides and Michael Gomes by Attorney David Milton.  |
| 03/29/2021 | #5    | ORDER: In light of the issues raised by the plaintiff's petition and the broad scope of the relief sought therein, it may best serve judicial economy for me to refer this matter to a panel of this court for consideration of the merits of the petition. See M.A.C. Rule 1.0; Mass. R. Civ. P. 64(a). On or before 03/31/2021, any party to this matter who opposes such a referral to the panel shall file their objection, including the reasons for their objection, in writing. So ordered. (Meade, J.). *Notice/Attest/Ullmann, J.  |
| 04/02/2021 |       | ORDER: As no objections were filed in response to my 03/29/2021 order, pursuant to M.A.C. Rule 1.0 and Mass. R. Civ. P. 64(a), I reserve and report, without a decision, the plaintiffs' petition to a panel of this court for determination. The clerk's office shall assemble the record to include all documents filed herein and shall enter the appeal on the court's panel docket. See Mass. R.A.P. 5. The appeal shall be entered without the payment of further fees, and shall proceed in accordance with the Massachusetts Rules of Appellate Procedure including the filing of briefs and appendices. To the extent that any party seeks to expedite briefing in this matter, they may file an appropriate motion in the appeal. So ordered. (Meade, J.). *Notice/Attest/Ullmann, J. |
| 04/02/2021 | #6    | Notice of Assembly of the Record to counsel.  |

As of 04/02/2021 5:15pm



APPEALS COURT  
Full Court Panel Case  
Case Docket

STEPHEN FOSTER & others vs. CAROL MICI & others  
2021-P-0293

CASE HEADER

|                |                      |                  |            |
|----------------|----------------------|------------------|------------|
| Case Status    | No briefs yet        | Status Date      | 04/02/2021 |
| Nature         | Equity               | Entry Date       | 04/02/2021 |
| Appellant      | Plaintiff            | SJ Number        |            |
| Brief Status   | Awaiting blue brief  | Case Type        | Civil      |
| Panel          |                      | Brief Due        | 05/12/2021 |
| Citation       |                      | Argued/Submitted |            |
| Lower Court    | Appeals Court        | Decision Date    |            |
| Lower Ct Judge | William J. Meade, J. | TC Entry Date    | 03/26/2021 |
| FAR Number     |                      | SJC Number       |            |

INVOLVED PARTY

**Stephen Foster**  
Plaintiff/Appellant  
Awaiting blue brief  
Due 05/12/2021

**Steven Palladino**  
Plaintiff

**Mark Santos**  
Plaintiff

**David Sibinich**  
Plaintiff

**Michelle Tourigny**  
Plaintiff

**Michael White**  
Plaintiff

**Frederick Yeomans**  
Plaintiff

**Hendrick Davis**  
Plaintiff

**Richard O'Rourke**  
Plaintiff

**Peter Kyriakides**  
Plaintiff

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**Michael Gomes**  
Plaintiff

**Carol Mici**  
Defendant/Appellee  
Awaiting red brief  
Due 06/11/2021

**Gloriann Moroney**  
Defendant/Appellee  
Awaiting red brief  
Due 06/11/2021

**Thomas Turco**  
Defendant/Appellee  
Awaiting red brief  
Due 06/11/2021

**Charles Baker**  
Defendant/Appellee  
Awaiting red brief  
Due 06/11/2021

**Ryan Duntin**  
Other interested party

**Dana Durfee**  
Other interested party

**Ariel Pena**  
Other interested party

**John E. Dutcher**  
Other interested party

**Anthony Barry**  
Other interested party

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[Stephen G. Dietrick, Esquire](#)

[Pamela Murphy, Esquire](#)

[Stephen G. Dietrick, Esquire](#)

[Vanessa Azniv Arslanian, Esquire](#)  
[Ryan P. McManus, Esquire](#)  
[M. Patrick Moore Jr., Esquire](#)

#### DOCKET ENTRIES

| Entry Date | Paper | Entry Text  |
|------------|-------|---|
| 04/02/2021 | #1    | Lower Court Assembly of the Record Package  |
| 04/02/2021 |       | Notice of entry sent.   |
| 04/02/2021 |       | Filing Fee waived by order of the Single Justice in 2021-J-0126.  |
| 04/14/2021 | #2    | Docketing Statement filed for Stephen Foster, Steven Palladino, Mark Santos, David Sabinich, Michelle Tourigny, Michael White, Frederick Yeomans, Hendrick Davis, Richard O'Rourke, Peter Kyriakides and Michael Gomes by Attorney Michael Horrell. |

As of 04/14/2021 4:15pm

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**SUPERIOR COURT  
CIVIL ACTION  
NO. 20-00855-D  
SJ-2020-0212  
SJC-12935**

**STEPHEN FOSTER, MICHAEL GOMES, PETER KYRIAKIDES, RICHARD O'ROURKE, STEVEN PALLADINO, MARK SANTOS, DAVID SIBINICH, MICHELLE TOURIGNY, MICHAEL WHITE, FREDERICK YEOMANS, and HENDRICK DAVIS,  
individually and on behalf of all others similarly situated,  
Plaintiffs,**

**v.**

**CAROL MICI, Commissioner of the Massachusetts Department of Correction,  
GLORIANN MORONEY, Chair Massachusetts Parole Board, THOMAS TURCO,  
Secretary of the Executive Office of Public Safety and Security, and CHARLES BAKER,  
Governor of the Commonwealth of Massachusetts,  
Defendants.**

**FINDINGS OF FACT OF THE SUPERIOR COURT**

**I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES**

On Friday, April 17, 2020, the Plaintiffs, nine of whom are or until very recently were inmates of facilities run by the Massachusetts Department of Correction (“DOC”), and two of whom are or recently were in county correctional facilities, filed a Class Action Complaint (“Complaint”) and Emergency Motion for Preliminary Injunctive Relief (“PI Motion”) with supporting affidavits in the Supreme Judicial Court against the Commissioner of DOC, the Chair of the Massachusetts Parole Board, the Secretary of the Executive Office of Public Safety and Security, and the Governor (collectively, the “Defendants”), seeking extensive relief set forth *infra* at Appendix A.<sup>1</sup> Plaintiffs seek to certify a class including the following two categories of Massachusetts inmates: (1) inmates whose age or underlying medical conditions subject them to

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<sup>1</sup> The Court refers to the Defendants as DOC, EOPSS, the Parole Board and the Governor.

a heightened risk of death or serious harm if they contract the COVID-19 virus; and (2) inmates who have been civilly committed to a correctional facility pursuant to G. L. c. 123, § 35 for alcohol or substance use disorders.<sup>2</sup> Plaintiffs assert that incarcerating them under their existing conditions of confinement during the COVID-19 pandemic violates their rights under articles 1, 10, 12, and 26 of the Massachusetts Declaration of Rights, and the 8<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution.

On Monday, April 20, 2020, a single justice of the Supreme Judicial Court issued a Reservation and Report & Interim Order (“Report and Order”) reserving and reporting the case to the full court and also referring the matter to the Superior Court for fact-finding. That same day, the Chief Justice of the Superior Court designated the undersigned judge to conduct the proceedings and make findings as set forth in the Report and Order.

The Report and Order required the Defendants to submit their responsive pleadings by 5:00 p.m. on Friday, April 24, 2020, and further required all parties to make their best efforts to submit a Statement of Agreed Facts that same day. Absent further court order, this Court’s findings of fact were to be submitted to the Supreme Judicial Court by Friday, May 1, 2020.

On Friday, April 24, 2020, the Defendants filed the following pleadings: (a) an Answer to the Complaint, filed by the DOC and EOPSS; (b) motions to dismiss the complaint, filed by the Governor and the Parole Board; (c) five affidavits described below; and (d) a 115-paragraph Proposed Statement of Agreed Facts submitted by the DOC (“DOC’s Proposed Findings of Fact”). Plaintiffs filed a 109-paragraph Plaintiffs’ Statement of Facts Not Agreed to by the DOC (“Plaintiffs’ Proposed Findings of Fact”) and a one-paragraph Statement of Facts Not Agreed to By the Governor. Plaintiffs and the DOC filed a 54-paragraph Statement of Agreed Facts

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<sup>2</sup> This Court has not made factual findings about the treatment of persons currently committed to a correctional facility pursuant to G. L. c. 123, § 35, for reasons set forth in Section II-C of these findings. See *infra* at 29.

Between Plaintiffs and Department of Correction. Plaintiffs and the Governor filed a two-paragraph Stipulation as to Agreed Facts Between Plaintiffs and Governor Baker.

On Sunday, April 26, 2020, plaintiffs and the Parole Board filed a 28-paragraph Stipulation as to Facts Agreed Facts Between the Plaintiffs and the Chairperson of the Massachusetts Parole Board (“Parole Board Stipulation”).

On Wednesday, April 29, 2020, Plaintiffs filed an affidavit of Robert Peacock, an inmate at MASAC. On April 30, 2020, shortly before the noon deadline set by this Court for all submissions other than agreed facts, Plaintiffs submitted an affidavit of a Prisoners’ Legal Services (“PLS”) attorney that includes an inmate affidavit, reports and other materials. Commissioner Mici submitted a supplemental affidavit (“April 30 Mici Affidavit”) with additional information on the DOC’s response to the COVID-19 pandemic and information responsive to the above-noted affidavit of MASAC inmate Peacock. Parole Commissioner Gloriann Moroney submitted an updated affidavit (“April 30 Moroney Affidavit”).

Pursuant to paragraph 1 of the Report and Order, the single justice indicated that all of the exhibits to the PI Motion, consisting of 28 affidavits,<sup>3</sup> are part of the record. Presumably, the parties’ subsequently filed affidavits and documents will also be part of the record.

### **Affidavits**

Plaintiffs’ initial 28 affidavits include (a) four affidavits of physicians focused on the nature and effects of COVID-19 and COVID-19 infection and transmission; (b) 21 affidavits of inmates of 10 of the 16 DOC facilities and three county correctional facilities, focused on the absence of social distancing and proper hygiene, and other conditions, in those facilities during the COVID-19 pandemic; (c) an affidavit of DOC Commissioner Carol Mici, submitted on

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<sup>3</sup> As used herein, the term “affidavit” includes affidavits and declarations under oath.

behalf of the DOC in another Supreme Judicial Court matter, focused on general hygiene at DOC facilities and the DOC's response to the COVID-19 pandemic (the "March 27 Mici Affidavit"); (d) an attorney affidavit focused on how the DOC's response to the COVID-19 pandemic is preventing the release on parole of inmates designated as suitable candidates for parole; and (e) an attorney affidavit setting forth the number and nature of violations found by the Massachusetts Department of Public Health ("DPH") in its most recent reports for each DOC facility.

Defendants' initial affidavits include (a) an affidavit of Commissioner Mici including the information set forth in the March 27 Mici Affidavit with minor revisions and further focused on the DOC's response to the COVID-19 pandemic between March 27, 2020 and April 24, 2020 (the "April 24 Mici Affidavit"); (b) an affidavit of the DOC's Deputy Commissioner of Clinical Services and Reentry, focused on intake and treatment of persons at the Massachusetts Alcohol and Substance Abuse Center ("MASAC") in Plymouth who have been civilly committed pursuant to G. L. c. 123, § 35; (c) an affidavit of the Superintendent of the Hampden County Sheriff Department's Stonybrook Stabilization and Treatment Centers ("SSTC"), focused on persons at SSTC's facilities in Ludlow and Springfield who have been civilly committed pursuant to G. L. c. 123, § 35; (d) an affidavit of the DOC's Assistant Deputy Commissioner for the northern sector, which includes the following facilities: MCI-Concord, MCI-Framingham, MCI-Shirley, North Central Correctional Institution ("NCCI-Gardner"), Northeastern Correctional Center, South Middlesex Correctional Center, Lemuel Shattuck Hospital Correctional Unit ("Shattuck Hospital"), and Souza-Baranowski Correctional Center; and (e) an affidavit of the DOC's Assistant Deputy Commissioner for the southern sector, which includes the following facilities: Bridgewater State Hospital, Old Colony Correctional Center,

Massachusetts Treatment Center (“MTC”), MCI-Cedar Junction, MCI-Norfolk, MASAC, and Pondville Correctional Center.

**The evidentiary hearing**

An evidentiary hearing was held beginning Monday morning, April 27, 2020 and concluding Wednesday afternoon, April 29, 2020. Based on the May 1, 2020 deadline for submission of these Findings of Fact, the Court limited the time for the parties to present evidence, allowing plaintiffs and defendants each a total of five hours for their direct and cross examinations. Therefore, not every disputed factual issue could be addressed; the parties had to prioritize.

Six inmates who are currently incarcerated at DOC facilities and one physician testified for the plaintiffs. Commissioner Mici testified on behalf of the DOC. All testimony was presented remotely. The Court’s factual findings based on the testimony are set forth *infra* in Section II-A.

**Agreed-upon and uncontested facts**

As noted above, on Friday, April 24, 2020, Plaintiffs and the DOC submitted a 54-paragraph Statement of Agreed Facts Between Plaintiffs and Department of Correction. The agreed facts include basic information about COVID-19, the total number and percent of DOC inmates and Massachusetts residents who had tested positive for the virus as of that date, demographic information about DOC inmates, the extent of the increase in COVID-19 infections inside DOC facilities over the last month, the protocol for entering a DOC facility, sleeping arrangements for DOC inmates, limitations on the ability to comply with federal and state social distancing guidelines, and hygiene.

Further, at this Court's request, the Plaintiffs reviewed the DOC's Proposed Findings of Fact, and the DOC reviewed Plaintiffs' Proposed Findings of Fact, to identify any facts with which the opposing party agreed or would not be offering contradictory evidence.

DOC indicated to this Court that it would not offer contradictory evidence as to the following paragraphs in Plaintiffs' Proposed Findings of Fact: 2, 3, 4, 5, 6, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 22, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 45, 47, 49, 55, 57, 61, 63, 64, 65, 66, 69, 70, 71, 72, 73, 77, 79, 80, 81, 82, 83, 85, 87, 89, 90, 91, 92, 93, 94, 97, 98, 106, 107, 108, and 109.

Plaintiffs indicated to this Court that they agreed to the following paragraphs in DOC's Proposed Findings of Fact: 1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 21, 36, 38, 51, 64, 76, 77, 86, 88, 89, 103, 104, 106, 109, 110, 111, and 112; and they would not offer contradictory evidence as to the additional following paragraphs in DOC's Proposed Findings of Fact: 3, 5, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 57, 67, 71, 72, 95, 99, 108, 114, and 115. The Court has not set forth herein all of the agreed-upon or uncontested facts. However, certain agreed-upon and uncontested facts provide important background and context. These are included in Sections II-B and II-C.

## **II. FACTUAL FINDINGS**

### **A. Witness Testimony**

Six current inmates of DOC facilities (all of whom had submitted affidavits), one physician, and DOC Commissioner Mici testified during the hearing. The Court found all of the witnesses to be either completely credible or credible as to significant parts of their testimony. The Court's findings reflect the portions of each witness's testimony that the Court credited. To the extent that some portions of the witness testimony has been omitted from the findings below,



such omission does not necessarily indicate that the Court discredited that testimony, but only that the Court did not have a sufficient basis upon which to credit it. In one instance, the Court specifically notes that it discredited certain witness statements based on other credible evidence.

The Court begins with the testimony of Commissioner Mici because it provides the best overview. The other witnesses are listed in the order of their testimony.

1. Commissioner Mici

Carol Mici is the Massachusetts Commissioner of Correction, having been appointed Acting Commissioner in December 2018 and Commissioner in January 2019. She has been a DOC employee for 32 years. Before becoming Commissioner, she served as a correction counselor, supervisor, deputy superintendent and superintendent of DOC facilities, and Deputy Commissioner of the DOC for inmate classification. Inmate classification is the process of determining where an inmate should be incarcerated based on his or her dangerousness. Additional factual findings based on the March 27 Mici Affidavit, the April 24 Mici Affidavit and the April 30 Mici Affidavit are set forth *infra*.

For at least several weeks, Commissioner Mici has been holding a daily staff meeting of corrections, medical, classification, and legal personnel every Monday through Friday morning, and often a second meeting later in the day. Commissioner Mici has handled a large number of phone calls over the weekend.

The 16 DOC facilities currently house roughly 7,500 inmates. Full capacity would be roughly 10,000 inmates. MCI-Framingham, MCI-Shirley, and the MTC are the three DOC facilities that have had the most serious COVID-19 problems. As of April 29, 2020, one or more inmates at five of the 16 DOC facilities had tested positive for COVID-19. No inmates at the

other 11 facilities had tested positive for the virus. Since April 3, 2020, all DOC facilities have been under a lockdown (the effects of which are described throughout these findings).

#### Social distancing and hygiene measures

As of April 29, 2020, 42% of all DOC inmates were in single cells, and 58% were in a cell with a second inmate or in a dorm room. It is not possible to maintain 6-foot social distancing in a two-person cell or a dorm. Therefore, currently, 58% of all inmates cannot keep a 6 foot distance from other inmates at all times.<sup>4</sup> In addition to cells in various facilities that are being reserved for additional quarantined inmates, there are some empty cells that could be used to separate inmates who are presently in a two-person cell. However, Commissioner Mici believes that many inmates, particularly women, would be worse off isolated in their own cells than having one cellmate, even if those cellmates cannot be a full 6 feet away. The DOC must consider the mental health consequences of isolation on inmates. If an inmate who does not have his or her own cell believes that his or her circumstances present a heightened risk from COVID-19, the inmate can request isolation and the DOC would refer the matter to its medical vendor Wellpath for an evaluation.

At least 50% of all inmates are over the age of 60 or have a medical condition putting them in a high-risk group. It would be impossible to put all such inmates in single cells. It would also require moving many inmates who have their own cells based on seniority.

In addition to the many advisories, plans, and policies issued by the Commissioner and described in her affidavits (plaintiffs do not dispute the issuance of these advisories, plans, and policies), her command staff relies on the Centers for Disease Control and Prevention (“CDC”) guidelines for social distancing and hygiene during the COVID-19 pandemic. The CDC

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<sup>4</sup> The discrepancy between the 72% statistic reported to the SJC on April 3, 2020 and the above-noted 58% statistic is explained *infra* in Section II-B.

guidelines recognize that full compliance with best practices is not feasible in all facilities, including prison facilities. Therefore, each facility has its own compliance plan. Commissioner Mici's advisories specifically address the need for inmates to refrain from fist bumps and hugs, from gang-affiliated signs involving touching which are discouraged in all circumstances, and to maintain social distance. All new inmates and any transfers from other facilities are quarantined for two weeks.

In March, the DOC began ordering very large amounts of personal protective equipment ("PPE") and cleaning supplies. The DOC also began ordering hand sanitizer that contained alcohol, which is something that it had previously avoided. Despite these efforts, supplies of hand sanitizer and cleaning equipment have run short at times. Inmates in the minimum-security section of MCI-Shirley have been transferring hand sanitizer from enormous jugs into smaller bottles for use at DOC facilities and by first responders across the Commonwealth. Existing housekeeping plans have been modified to increase the cleaning of high touch areas. Commissioner Mici believes there are sufficient numbers of inmate workers (called "runners") to keep high touch areas clean.

Only staff, vendors, and attorneys have been allowed inside DOC facilities since restrictions were imposed.<sup>5</sup> Staff and vendors are required to wear masks at all times inside the facilities. The DOC has used video inside the facilities to identify correctional officers ("COs") who are not wearing masks. COs who are caught without masks are initially given verbal warnings. Some have subsequently been given written warnings. One ranking officer was given a five-day suspension because none of the COs under his supervision were wearing masks.

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<sup>5</sup> It appears that in-person attorney visits were barred at least temporarily on March 21, 2020. See March 27 Mici Affidavit, par. 64.

Between Friday, April 24 and Tuesday, April 28, surgical masks were distributed to all inmates at all facilities. Inmates have been “strongly encouraged” to wear their masks as much as possible when outside their cell or dorm. Commissioner Mici believes that the DOC does not have authority to force inmates to wear masks. She stated that the inmates are “adults” who can make the decision to protect themselves. She was told that inmates at one facility were flushing the masks down the toilet.

The DOC’s medical vendor, Wellpath, is responsible for ensuring that its staff wear PPE, which includes masks, gloves, gowns and removable sleeves. DOC handles the protocol under which persons can enter the facilities.

Since COVID-19 was first detected inside a DOC facility, the DOC has implemented increasing social distancing restrictions. Initially inmates could use the gyms, weight rooms, and prison yards. DOC first banned contact sports, then barred all inmates from gyms, weight rooms, and prison yards. Outside staff (e.g. librarians, teachers) can no longer enter. Beds have been moved as far from each other as possible, although the beds in some institutions are bolted to the floor.

#### Other topics

The lockdown prevents inmates from using outdoor prison yards, even though in general there is less transmission of COVID-19 outdoors than indoors. There are several reasons for this decision. In many facilities, the outdoor space is a long distance from the indoor space, making it difficult to maintain social distance and security. Social distancing is difficult in some of the yards, and monitoring social distance is difficult in others. In some facilities, allowing only a safe number of inmates to use the yard at one time would essentially require a 24-hour operation.

Commissioner Mici believes it would be a bad decision to allow use of the outdoor spaces in only some of the facilities, and she must therefore consider the issues at all facilities.

Three weeks before an inmate is due to be released or transferred to another facility, Wellpath gets the inmate's name and tests any inmate who has tested positive for COVID-19 or has been quarantined. This does not happen if a judge orders the immediate release of an inmate.

The DOC has taken numerous steps to expedite the medical parole process. Commissioner Mici requires the superintendents of all facilities to provide expedited notice to the district attorneys and victims. Deadlines, including the time period within which a victim can request a hearing, have been shortened. Home plans for inmates who may qualify for medical parole are reviewed earlier in the process. MassHealth is notified so that the inmate has medical insurance upon leaving the facility. The DOC has encouraged the Committee for Public Counsel Services and PLS to assist inmates in creating home plans.

Commissioner Mici has implemented numerous measures to reduce the loss of good time credit that would otherwise result when inmates lose the opportunity to work and attend programs. Anyone who was earning good time credit as of March 1, 2020 earned the full amount of that good time credit for March. Commissioner Mici does not believe she has authority to give inmates good time credit without the inmate doing something for it. Therefore, she has implemented a journaling program in which the inmates will receive 7.5 days of good time credit in April if they keep a journal each day. Commissioner Mici is considering increasing the good time credit to 10 days in May.

The DOC immediately looked into the allegations of Robert Peacock, the MASAC inmate who alleged in an affidavit filed April 28, 2020 that he was being denied treatment and was housed in filthy conditions. Peacock entered MASAC on April 24, 2020, as a direct referral

from a hospital. He has been undergoing detox and will be quarantined for 14 days. He will receive treatment. (This is addressed in the April 30 Mici Affidavit.)

Inspectors from the DPH go through each facility twice a year and come up with an action plan. Some of the recommendations are “suggestions.” Commissioner Mici testified that the DOC “compl[ies] with what we can.” There have been no DPH inspections since the pandemic hit Massachusetts.

Commissioner Mici agrees that DOC should be doing what it can to reduce the prison population, consistent with law and appropriate release decisions. Commissioner Mici believes that DOC is doing the best it can to manage the COVID-19 crisis given the physical layout of the facilities and the inmate population.

The DOC and EOPSS have had discussions about ways to give inmates completion credit so that they can be released into parole supervision 80 days before the end of their sentence. The DOC has created a program in which inmates can obtain completion credit by educating themselves on COVID-19. Around 40 inmates began this process in late March, and some have been released.

As set forth above, all new inmates and any transfers from other facilities are quarantined for two weeks. Currently, there are many open cells in the quarantine unit to provide housing in the event of a spike of positive COVID-19 test results. Inmates who have tested positive or have refused a test are also quarantined. No inmate who has tested positive or who has been exposed and refused a test is in the same cell or dorm room as inmates who have not tested positive and (to the knowledge of DOC) have not been exposed. Commissioner Mici is considering separating the inmates who have refused testing from those who have tested positive.

As of April 29, 2020, there have been seven inmate deaths at DOC facilities attributed to COVID-19, including five at MTC and two at MCI-Shirley. As of the same date, there were roughly 10 inmates hospitalized with COVID-19. Around 20-25 inmates in total have been hospitalized in April due to COVID-19. Increased testing at MCI-Shirley during the weekend of April 25-26 led to a spike in positive tests. (This suggests there were many inmates there with COVID-19 who were asymptomatic or had relatively minor symptoms.). Of the roughly 250 inmates tested, roughly 50-60 inmates tested positive, centered around four “hotspot” units.

Around 23-24% of all DOC inmates have serious mental illness. There has been no spike in suicide watches during the pandemic.

There have been no furloughs or releases to home confinement during the pandemic. The DOC has not used furloughs since the 1990s, believing it is bad policy to release an inmate who will need to be re-incarcerated. The DOC does not believe it has the authority to allow an inmate to serve any portion of a state prison sentence in home confinement.

## 2. Michael White

White is a 35-year-old inmate at MCI-Concord, who indicated in his affidavit (PI Motion, Exhibit 13) that he is serving an 18-month sentence for unarmed robbery. White suffers from chronic obstructive pulmonary disorder (COPD) and uses a nebulizer to manage his condition. He expects to be released in July 2020.

White resides in unit L-2, which has roughly 40 bunk beds for 80 inmates. The bunk beds are perpendicular to the walls, and parallel to and roughly 3 feet apart from each other, at either end of a large room. Picnic tables are in the middle of the room.

## Social distancing

White has been unable to maintain a 6-foot social distance from other L-2 occupants while sleeping, eating, using the bathrooms and talking on the phone. As noted above, the bunk beds are 3 feet apart from each other. The L-2 unit has two bathrooms, each of which have eight sinks that are roughly 1 foot apart from each other (each toilet and shower is separated by walls). White tries to wait for quiet times to use the bathroom, but other inmates frequently come in and use adjacent sinks. Because of the lockdown, meals are served in the dorm room. Whether White sits at a picnic table or on his bed, there is usually someone within arm's reach. When COs see inmates less than 6 feet from each other, they don't say anything. Inmates are also close to each other when nurses dispense medications in the hallway outside the dorm.

#### Hygiene

As of April 27, 2020, inmates had not been given masks.<sup>6</sup> The COs have masks and use them roughly 75% of the time. Earlier in April, hand sanitizer was available from a dispenser on the dorm wall until 3:00 p.m. The dispenser is now locked.

The Court did not credit this witness's testimony about the infrequency of cleaning of the unit, because it was contradicted by DOC affidavits and significantly different than the testimony of the other inmate witnesses as to frequency of cleaning, recognizing that the other witnesses are at other institutions.

#### Other conditions

Since the prison lockdown started in early April, inmate occupancy of L-2 has dropped from roughly 80 inmates to roughly 50 inmates, primarily because of fights and inmates being caught with home brew alcohol. White attributes both phenomena to the lockdown. Also, several inmates have been moved out of the unit because of symptoms of COVID-19. Because

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<sup>6</sup> There is evidence that surgical masks were given to all inmates within a day after White's testimony.



of the lockdown, White has not left the unit in the past several weeks. There are no outdoor activities or group classes and use of the gym is prohibited.

### 3. Ryan Duntin

Duntin is a 38-year-old inmate at MTC who indicates in his affidavit (PI Motion, Exhibit 17) that he is serving a 7-10 year sentence for sex trafficking. He believes that with good time credit he is eligible for parole sometime next year. As a child, Duntin was prone to bronchitis and high fevers. He has chronic bronchitis, which periodically manifests itself in shortness of breath and dry coughing.

Duntin is housed in South One at MTC. South One includes 13 cells, with six beds in each cell. Each cell is roughly 30 x 12 feet. Each cell has three bunk beds, with the long side of each bed against the wall, and the beds roughly 2 ½ to 3 feet from each other, as well as three desks and tables for toiletries. Duntin's cell currently houses six inmates, but some of the other cells are not full, because several men were moved out due to their medical condition. There is a very long hallway outside the cells which Duntin estimates to be 6 ½ to 7 feet wide. There is also a day room, roughly 70 x 30 feet, where the South One inmates can play board games, attend support groups, read, and hang out. There are bathrooms at each end of the hallway.

#### Social distancing

Duntin sleeps in the middle bunk bed in his cell. Based on the layout of the beds, Duntin's head is more than 6 feet from the head of the men in the adjacent bunk beds, but closer than 6 feet to the inmate with whom he shares a bunk bed. In an effort to maintain social distancing, and following advocacy by inmates, MTC has limited dayroom occupancy to 24 inmates at a time. However, with nowhere else to go due to the lockdown, inmates hang out together in the hallways. Much of the day, inmates are within 6 feet of each other.

The bathroom sinks are roughly 14-18 inches apart from each other. Inmates are “elbow to elbow” at the sink during morning “rush hour” and at night, because everyone wants to wash up and brush their teeth at the same time.

Since the lockdown, the COs have been bringing meals to the unit. Most inmates eat in their cells or in the hallway, leaning against opposite walls. Duntin estimates that when this happens, the inmates are 4-5 feet from each other.

Duntin estimates that he is within 6 feet of another inmate at least half of the day. This includes time when he is an active participant in support groups and other group activities. Duntin has never heard a CO telling any inmate to stay farther apart from other inmates.

#### Hygiene

Duntin presented more favorable testimony about hygiene than was presented by some other inmates in their testimony and affidavits. Inmates try to clean the bathrooms two or three times each day, though they sometimes fall short. The toilets are cleaned once each day. The showers, which have individual stalls, are cleaned once or twice each day.

Inmates do not have masks or gloves.<sup>7</sup> Duntin estimates that 30-40% of the time staff members do not have their masks, or are wearing them around their neck. Staff members who are new to the unit wear their masks more frequently.

#### Other conditions

In March 2020, Duntin had bad head and body aches. He skipped work in the kitchen, and stayed away from other inmates, but did not initially seek medical attention. When he reported that he was sick, he was taken to MTC’s Health Services Unit, given a “cold pack”

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<sup>7</sup> As noted *supra* it appears this has changed since Duntin’s testimony, as to surgical masks.

(Tylenol, Mucinex, etc.) and told to stay out of work for one day. (It should be noted that DOC's COVID-19 related protocols have changed significantly since March.)

4. Michelle Tourigny

Tourigny is a 53-year-old woman who indicates in her affidavit (PI Motion, Exhibit 12) that she is serving a life sentence with parole eligibility at MCI-Framingham. She has been incarcerated for roughly 22 years. Tourigny has her own cell in the health services unit (HSU) due to a wide range of medical conditions, including spinal stenosis, lung injury, a heart condition, morbid obesity, diabetes, and a thyroid condition. She also suffers from PTSD, bipolar disorder and anxiety disorder.

Tourigny is visited twice a day by a nurse and four times a week by a doctor. They are typically accompanied by two COs. Sometimes, the COs wear masks and gloves, and sometimes they do not. The inmates have had masks since April 18.

Tourigny applied for medical parole on March 31, 2020. On or about April 24, 2020, she was given releases to sign, which is one step in the medical parole process. As of April 27, 2020, she had not received formal notice of her application.

5. Dana Durfee

Dana Durfee is a 45-year-old inmate at NCCI-Gardner who indicated in his affidavit (PI Motion, Exhibit 18) that he is serving a two-year sentence for receiving stolen property. Durfee resides in unit G-1. The G building has two floors. The G-1 unit houses 38 inmates who sleep in a dorm room roughly 28 x 66 feet. The bunk beds are against the wall and parallel to each other, roughly 3 ½ feet apart.

### Social distancing

Durfee shares a bunk bed, and there are two inmates sleeping in the bunk beds on either side of Durfee's bed. He does not sleep head to toe because, if he changed position, his head would hit a TV stand.

The G-1 unit has one bathroom that includes three currently working commodes, one urinal, three washing sinks and one mop bucket sink. The washing sinks are a foot or so apart from each other. Most of the time when Durfee washes his hands another inmate is using an adjacent sink.

Since the lockdown began on April 3, he and most other inmates eat on their beds, roughly 3 feet from each other. When the food is delivered, the inmates line up for the trays, one or two feet apart from each other. No CO has requested that the inmates distance themselves from each other.

Durfee gets medications twice a day. The procedure is that when a bell rings, the inmates line up in the hallway. The line goes up the stairs to the second floor, and includes roughly 15 inmates in the morning and 20 in the evening. There is an inmate on the stairway every one or two steps. Inmates also wait on the stairway to make phone calls.

There is a day room shared by both units in the G building for exercise, card playing, pool, and reading. During the busy times, there are roughly 20-30 inmates in the dayroom at one time. Durfee tries to maintain social distance, but he does not tell other inmates to do so.

On Friday night, April 24, there was a microwave fire, and all of the inmates in Durfee's unit were brought into the gym. They sat one or two feet apart from each other until it was safe to reenter the unit. The process was overseen by roughly five sergeants and other COs. No one attempted to enforce social distancing.

The COs have masks and generally wear them. However, Durfee has seen COs within 6 feet of each other and within 6 feet of inmates, who were not wearing masks. The use of gloves among COs is less common. All inmates in Durfee's unit received masks Friday night, April 24.

#### Other conditions

Since the lockdown, Durfee has not been able to work, play basketball, or leave the unit (except during the microwave fire). He is earning 7.5 days of good-time credit per month by keeping a journal.

#### 6. Stephen Foster.

Foster is a 43-year-old inmate at Old Colony Correctional Center. He is the lead named plaintiff. Foster indicated in his affidavit (PI Motion, Exhibit 5) that he is serving a 3-5 year sentence for assault & battery and other charges. He has a significant number of physical health issues that have compromised his immune system, and serious mental illness, as set forth in his affidavit. Foster is currently housed in the orientation unit at Old Colony Correctional Center. The unit is shaped in a horseshoe with two tiers and contains a total of roughly 60 cells. Except for nine singles, all of the cells are doubles.

#### Social distancing

Foster lives in a 12 x 7 foot cell with a bunk bed, TV, sink, toilet, and shelves. He does not sleep head to toe because his cellmate wants to sleep with his head against the wall, and if Foster changed position his head would be 2 feet from the toilet and 6 inches from the ladder that his cellmate climbs to reach the upper bed. He is usually 4 feet from his cellmate, which is as much distance as he can maintain. Since the lockdown, Foster spends 23 ½ hours a day in his cell. He leaves the cell to make phone calls and shower.

Inmates are let out of their cells 8-10 at a time. There are two clusters of four phones each. When Foster talks on the phone, his face is often a foot or so from another inmate's face. Inmates often wipe down the phones before each use. Cleaning materials are available in the common areas. When he gets his medications, there are typically five or six inmates "an arm's length" away from each other.

### Hygiene

As of April 28, most of the COs were using their masks properly. Some COs do not wear masks. This is true when meals are served, when inmates get their medications, and when inmates pick up clothing and other items that have been delivered to them. Nurses change their gloves before giving him his medications when he makes the request.

All inmates were given masks on Saturday, April 25. Foster wears his mask because of his health issues. At any given time, roughly 30-40 % of the inmates are wearing masks, but some never wear them.

Since late March, there has periodically been no hand sanitizer in the common area, and at times Foster has had no access to cleaning supplies for his cell.

### Other conditions

Before work opportunities and classes were suspended, Foster was out of his cell roughly 10-12 hours per day, working in the laundry, going outdoors, playing cards in the dayroom, and some days, attending classes. He was getting 7.5 days of good time credit each month for taking a violence reduction class and 7.5 days of good time credit per month for working in the prison laundry. He cannot get a good time credit "boost" for his class because the program vendor is not in the facility to give the required quiz. Foster stopped working in the laundry after word of the pandemic had spread, but before the lockdown, because he feared handling other inmates'

laundry due to his compromised immune system. He is now getting 7.5 days of good time credit per month for keeping a journal.

Before the lockdown, Foster saw a mental health therapist twice a month for a roughly one-hour visit. He has not seen the therapist alone since the lockdown, and has had only one brief conversation with the therapist at his cell door. Mentally, he feels as if someone is “playing Russian roulette” with his life.

#### 7. Ariel Peña

Ariel Peña is an inmate at MCI-Shirley who indicated in his affidavit (PI Motion, Exhibit 23) that he is serving a 6-8 year sentence for drug possession with intent to distribute. Peña has diabetes and other health issues set forth in his affidavit. He resides in unit F-1 in the medium security section of the prison. The cells in F-1 are arranged in a horseshoe, with an internal common area that has a kiosk, tables, microwave, and telephones. The unit has 24 singles and 35 double cells. The cells are roughly 8 x 10 or 8 x 11 feet.

#### Social distancing

Peña is in a double that includes a bunk bed, desk with hinged stool, two lockboxes, shelves, a toilet and a sink. He is usually 3-4 feet from his cellmate. He sleeps on the bottom bunk.

#### Hygiene

Peña (along with all other MCI-Shirley inmates) was given a mask on April 28. He wears his mask when he is out of his cell, but not inside his cell because he has been living with the same cellmate for the past month and feels it is too late. (This explanation does not consider the possibility that his roommate recently contracted COVID-19 or will do so in the future.).

Peña cleans his own cell with soap and water and a mop. Inmates get soap, but he is not allowed to have cleaning chemicals in his cell. For around two weeks in April, there was no hand sanitizer in the common room dispenser.

#### Other conditions

At the time of the lockdown, Peña was attending Boston College classes in prison with the goal of getting a college degree. All classes have been suspended.

Since the lockdown, he and the other inmates eat inside their cells. During the lockdown, inmates initially were let out of their cells for 40 minutes a day, then 50 minutes, and now one hour. During that time, inmates can shower, use the telephones and microwave, and use the kiosk to place commissary orders or send and receive email. Inmates cannot go outdoors.

#### 8. Yoav Golan, M.D.

Dr. Golan is an attending physician, infectious disease specialist, and associate professor of medicine at Tufts University School of Medicine. For over 13 years, he provided HIV care at the Suffolk County House of Correction. He has expertise on COVID-19 and a strong general understanding of how COVID-19 might spread among inmates, staff, and those who enter prisons and jails. His affidavit (PI Motion, Exhibit 2) concisely sets forth his expert opinion as to why the standard of care for COVID-19 cannot be achieved in prisons.

Dr. Golan's direct examination sought to focus the Court on certain portions of his affidavit. His affidavit is four pages, and provides more and better information than a summary of his direct examination can provide. On cross-examination, Dr. Golan admitted that he has not been inside any prison during the COVID-19 pandemic, and therefore, he has no first-hand knowledge of the DOC's responses to the pandemic.



During his examination, Dr. Golan testified that the fact that no inmates at 11 of the 16 DOC facilities have tested positive does not necessarily mean that the virus is being contained in those facilities, because the statistic could reflect insufficient testing or lack of testing.

**B. Additional Factual Findings**

Having made findings of fact with regard to the testifying witnesses, including assessments of their credibility, any additional fact-finding by this Court can be done by the Justices of the Supreme Judicial Court, because it involves only assessing the affidavits, documents and agreed-upon or uncontested facts that are in the record. Certainly, there is no good reason to delay the submission of these Findings of Fact to the Supreme Judicial Court so that this Court can make such findings. However, consistent with the timeframe that the Supreme Judicial Court has given this Court for its factual findings, the Court believes that the following additional fact-finding may be of some benefit to the Supreme Judicial Court and members of the public.

**1. Demographics of Massachusetts Inmates**

Massachusetts has the highest percentage of elderly prisoners compared to all other states. According to the DOC, in 2019, 983 inmates (11%) were over 60 years old. PI Motion, Exhibit 2, par. 15; Exhibit 4, par. 7. Prisoners have a higher rate of chronic diseases than the general population, which gives them a greater vulnerability to severe illness or death from COVID-19. PI Motion, Exhibit 4, par. 8; Plaintiff's Proposed Findings of Fact, par. 13. Studies have also shown that prisoners age more rapidly than the general population, meaning that they develop chronic conditions and disability about 10-15 years earlier than the general population. PI Motion, Exhibit 4, par. 8; Plaintiff's Proposed Findings of Fact, par. 14.

## **2. Inmate and Employee COVID-19 Diagnoses and Deaths**

According to DOC reports, as of April 23, 2020, a total of 127 DOC inmates had been diagnosed with COVID-19. Of that number, 44 were at MTC, 41 at MCI-Shirley, 27 at MCI-Framingham, 12 at Bridgewater State Hospital, two at the Shattuck Hospital, and one at MCI-Norfolk, who appears to have contracted the virus while outside the prison. As of April 30, 2020, there had been seven inmate deaths due to COVID-19; five at MTC and two at MCI-Shirley.

As of April 23, 2020, a total of 53 DOC staff members had also tested positive for the virus, four of whom include “non-facility” staff. The facility total included 12 employees at MCI-Framingham, 11 at MCI-Shirley, 10 at MTC, six at MCI-Cedar Junction, three each at MCI-Norfolk and Shattuck Hospital, two at the Souza-Baranowski Correctional Center, one at MCI-Concord, and one at Old Colony Correctional Center. As of the same date, there had been no staff deaths due to COVID-19.

The Special Master appointed by the Supreme Judicial Court in *CPCS v. Chief Justice*, 484 Mass. 431 (2020) provides weekly reports to that Court containing information on the spread of COVID-19 in the Massachusetts prisons and jails.

The rate of positive tests among prisoners is higher than the rate for the Massachusetts population as a whole. Plaintiff’s Proposed Findings of Fact, par. 2. As of April 20, 2020, 548 total prisoners (DOC and counties) had been tested for COVID-19. *Id.* Of these, 214, or 39%, were positive. As of April 21, 2020, the total number of tests administered in Massachusetts was 175,372, and the number of positive results was 41,999, or 23%. *Id.*<sup>8</sup>

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<sup>8</sup> See also Mass DPH COVID-19 Dashboard – Tuesday, April 21, 2020, available at <https://www.mass.gov/info-details/covid-19-response-reporting>

### **3. DOC's Response to COVID-19 Pandemic**

On March 10, 2020, Governor Baker declared a state of emergency based on the spread of the COVID-19 virus. Between March 12, 2020 and April 30, 2020, the DOC has issued numerous advisories, plans, policies and procedures to staff and inmates; made extensive purchases of personal protective equipment ("PPE"), soap, hand sanitizer and cleaning equipment; limited access to its facilities and imposed strict procedures for entering its facilities; tested staff and inmates for the virus, increasing its testing over time; and quarantined inmates who have tested positive for the virus or refused to be tested. These measures are set forth in paragraphs 22-84 of the April 24 Mici Affidavit, and the exhibits thereto, and paragraphs 5-18 of the April 30 Mici Affidavit. To avoid redundancy, the Court has not included these paragraphs herein. The Court notes that plaintiffs agree or do not contest most of the measures that DOC has taken. See *supra* at 4. Plaintiffs dispute the extent to which DOC's policies and procedures on use of PPE by staff and inmates and social distancing have been implemented. Plaintiffs also rely on the fact, admitted to by DOC, that most DOC inmates (58% at last count) cannot maintain a 6 foot distance at all times from other inmates and staff.

### **4. Mobile testing**

On April 30, 2020, DOC reported to the Court that during the second half of April it had done extensive mobile testing at the three facilities that had the highest number of positive test results for COVID-19. At MCI-Framingham, 108 inmates were tested, and 40 inmates tested positive. (Testing was also done at the South Middlesex Correctional Center ("SMCC"), because it is a pre-release facility for MCI-Framingham inmates. Of the 41 SMCC inmates who were tested, none tested positive for COVID-19.) At MCI-Shirley, 236 inmates were tested, and 78 inmates tested positive. At MTC, 460 inmates were recently tested. The results were

unavailable as of April 30, 2020. This mobile testing does not reflect the total amount of testing at any of these facilities. According to the affidavit of DOC Assistant Deputy Commissioner Ferreira, as of April 24, 2020, 62 inmates at MCI-Framingham had tested positive for COVID-19. Ferreira Aff. ¶ 25.

**5. DOC Discrepancy as to 6-foot Social Distancing in Correctional Facilities**

On April 3, 2020, the DOC informed the Supreme Judicial Court that 72% of all DOC inmates were sleeping within 6 feet of one another. See DOC letter to SJC in *CPCS v. Chief Justice*, Dkt. # 56. However, this information was based on the percentage of all *beds* in DOC facilities that were in dorms or two-person cells. DOC facilities held a total of 7,442 inmates as of April 29, 2020, a decrease of 523 inmates since March 9, 2020, the day before Governor Baker declared a state of emergency. Currently, 58% of all DOC inmates *actually sleep* in a two-person cell or a dorm, and therefore 58% of all DOC inmates sleep within 6 feet of another inmate. Comparing the 72% figure provided by the DOC on April 3, 2020 and the most recent 58% figure is comparing apples and oranges, which is why the difference between 72% and 58% (almost 20%) is significantly greater than the decrease in the total number of DOC inmates (roughly 6.6%).

**6. Restrictions on Movement Due to DOC Lockdown**

It appears to be uncontested that, since the DOC lockdown on April 3, 2020, inmates who live in cells have been spending 23 hours a day in their cells, and inmates living in dorms have been unable to leave their units.

**C. Findings of Fact Specifically Related to Methods for Decreasing Prison Population Sought By Plaintiffs as Requested Relief**

During her testimony, Commissioner Mici agreed that decreasing the inmate population at DOC facilities can help contain the spread of COVID-19, and that measures to reduce the

inmate population should be taken, though only to the extent that they are lawful and appropriate in light of the overall health and safety of the public. DOC facilities held a total of 7,442 inmates as of April 29, 2020, a decrease of 523 since March 9, 2020, the day before Governor Baker declared a state of emergency. The following findings of fact address measures that the DOC and the Commonwealth have or not taken relevant to the relief sought by Plaintiffs.

### **Medical Parole**

DOC has taken numerous steps to expedite the medical parole process. Commissioner Mici has asked the superintendents of all facilities to expedite the processing of medical parole petitions. This includes requiring expedited notice to the district attorneys and victims. Deadlines including the time period in which a victim can request a hearing have been shortened. Home plans for inmates who may qualify for medical parole are reviewed earlier in the process. MassHealth is notified so that the inmate has medical insurance upon leaving the facility. DOC has encouraged CPCS and PLS to assist inmates in creating home plans. Mici Testimony, *supra* at 11.

### **Good time credit**

The COVID-19 pandemic can have the unfortunate effect of lengthening sentences that would otherwise be served by inmates who pursue work and education inside the facilities, because the DOC lockdown and COVID-19 prevention measures have limited those opportunities. Plaintiffs are looking to expand rather than contract the amount of available good-time credit by increasing the availability of earned good time (awarded monthly), boost time (a one-time 10 day credit), and completion credit (a one-time credit of up to 80 days) available pursuant to G. L. c. 127, §§ 129C, 129D, and 130B.

Commissioner Mici has implemented numerous measures to reduce the loss of good time credit that would otherwise result when inmates lose the opportunity to work and attend programs. Anyone who was earning good time credit as of March 1, 2020 earned the full amount of that good time credit for March. Mici does not believe she has authority to give inmates good time credit without doing something for it. Therefore, she has implemented a journaling program in which the inmates will receive 7.5 days of good time credit in April if they kept a journal each day. Commissioner Mici is considering increasing the good time credit to 10 days in May. Mici Testimony, *supra* at 11.

### **Parole**

Measures that the Parole Board has taken during the COVID-19 pandemic with regard to release of inmates who have been approved for parole, and the extent of recent Parole Board hearings, are set forth in the Parole Board Stipulation. On April 29, 2020, the Parole Board entered into a contract with the Massachusetts Alliance for Sober Housing (“MASH”). MASH has identified over 200 available beds in more than 50 certified sober homes. Under the contract, the Parole Board will fund, for up to eight weeks, a bed in an approved and contracting MASH sober home for a total of 150 parolees, probationers, or discharged inmates. April 30 Moroney Affidavit, ¶ 3. To increase the number of hearings the Parole Board can conduct, pursuant to 120 Code Mass. Regs. § 300.03(2), the Parole Board has designated two hearing examiners to conduct parole hearing for inmates serving house of correction sentences. This designation will increase the number of individuals available to conduct hearings. The hearing examiners expect to begin conducting hearings the week of May 4, 2020. *Id.*, ¶ 4.

### **Furloughs and home confinement**

There have been no furloughs or releases to home confinement during the pandemic. The DOC has not used furloughs since the 1990s, believing it is bad policy to release an inmate who will need to be re-incarcerated. The DOC does not believe it has the authority to allow an inmate to serve any portion of a state prison sentence in home confinement.

**Early release by executive order or commutation of sentence**

Since Governor Baker declared a state of emergency on March 10, 2020, he has not ordered the early release of any inmate by executive order and has not sought the advice and consent of the Executive Council for commutation of the sentence of any inmate. See Stipulation as to Agreed Facts Between Plaintiffs and Governor Baker, ¶¶ 1-2.

**C. Other Factual Matters**

1. Treatment for inmates civilly committed under G. L. c. 123, §35

In the evening of April 30, 2020, DOC submitted a Supplemental Affidavit of Jennifer Gaffney, DOC's Deputy Commissioner of Clinical Services and Reentry, describing treatment services that are currently being provided to civilly committed residents of MASAC, and treatment services that have been curtailed in light of DOC's response to COVID-19. DOC also submitted a Supplemental Affidavit of Kevin Crowley, superintendent of the Hampton County Sheriff's Department, describing the current level of treatment of civilly committed residents of the STCC. These affidavits, submitted in response to questions posed by the Court earlier in the day, discuss extensive treatment opportunities for persons civilly committed under G. L. c. 123, §35, contrary to certain allegations in plaintiffs' Complaint. However, because they were submitted after the noon April 30 deadline that the Court had set for filings other than agreed facts, the plaintiffs have not had an opportunity to respond.

## 2. Prison occupancy limits

The parties contest the number of inmates that lawfully can or as a policy matter should be held at various DOC facilities, based on whether design/related capacity or operational capacity is considered; whether the DPH regulations on cell or dorm size are recommended or required, and other factors. These issues involve complicated legal and factual disputes, and they were not the subject of any substantive testimony. Therefore, the Court has not addressed these issues herein.

Dated: May 1, 2020

\_\_\_\_\_/s/\_\_\_\_\_  
Robert L. Ullmann  
Justice of the Superior Court

### **APPENDIX "A"** **Relief Requested by Plaintiffs**

1. Certify a class of all prisoners who are incarcerated at prisons and jails in Massachusetts, including two subclasses: (1) All prisoners who are at high risk for serious complication or death from COVID-19 due to underlying medical condition or age, ("medically vulnerable subclass); and (2) All prisoners civilly committed to a correctional facility under G.L. c. 123 §. 35 for the purpose of receiving treatment for an alcohol or substance use disorder, (Section 35 subclass).

2. For the duration of the COVID-19 emergency, enjoin the Defendants, their agents, officials, employees, and all persons acting in concert with them from:

- a. Housing any prisoner in any correctional facility where the population exceeds the Design/Rated capacity of that institution;
- b. Housing any prisoner in a cell, room, dorm, or other living area that does



not meet the minimum size standards established by the DPH in 105 CMR 451. 320-322;

- c. Housing any prisoner in a cell, room, dorm, or other living area where they must sleep, eat, or recreate within six feet of another person;
- d. Maintaining any Medical or Health Services Unit, or medication distribution area, in which prisoners must wait for or receive treatment or medication within six feet of another person, other than their medical provider; or
- e. Transferring any prisoner from a county jail to the DOC.

3. Enjoin the Defendants, their agents, officials, employees, and all persons acting in concert with them from confining in a correctional facility the Plaintiffs or any other person civilly committed under G.L. c. 123 § 35.

4. Order the Defendants to immediately reduce the number of people confined in prisons and jails by at least a sufficient number to ensure compliance with the relief requested in No. 2 above, prioritizing release for Plaintiffs in the medically vulnerable subclass.

Mechanisms for population reductions should include but not be limited to:

- a. Expanded use of home confinement;
- b. Expanded use of furloughs, including allowing furloughs for longer than the 14 days authorized by G.L. c. 127, § 90A;
- c. Maximizing the award of good conduct deductions, including completion credits and “boost time” under G.L. c. 127, § 129D, and authorizing the award of more such deductions than is permitted by § 129D;

- d. Identifying all prisoners who may qualify for medical parole, under G.L. c. 127, § 90A, taking all necessary steps to ensure that a medical parole petition is filed immediately, and granting medical parole to those who qualify as quickly as possible and in no event more than one week after the petition is filed;
  - e. Maximizing the use of commutation and clemency; and
  - f. Maximizing the use of the Governor's emergency powers and all other available mechanisms to grant releases to all those who are vulnerable to serious illness and death from COVID-19 due to age or underlying medical condition, and all those who are within one year of release, unless there is clear and convincing evidence that such release would pose a risk to public safety outweighing the public health risk of their continued incarceration.
5. Order the Parole Board to:
- a. Exercise its authority under G.L. c. 127, § 130, and 120 Code Mass. Regs. § 200.10 (2017), to make all persons serving house of correction sentences eligible for early parole;
  - b. Consider the dangers posed by COVID-19 when it evaluates whether "release is not incompatible with the welfare of society," as required by G.L. c. 27, § 130;
  - c. Presumptively grant parole to all parole eligible individuals unless it makes a determination based on clear and convincing evidence that the person cannot live at liberty without violating the law;

- d. Expedite the actual release of all individuals who have been granted parole or medical parole contingent on approval of a home plan or satisfaction of some other condition;
  - e. Ensure that no prisoner is held beyond his “release to supervision date” under G.L. c. 127, § 130B; and
  - f. Conduct parole hearings for all parole eligible prisoners no later than 60 days prior to their parole eligibility date, as required by G.L. c. 127, § 136.
6. Appoint the Special Master from *Comm. for Pub. Counsel Servs. et al. v. Chief Justice of the Trial Court et al.*, SJC-12926 to oversee compliance and implementation of the Court’s orders in this case.

Notify

2/17/21 Emailed to  
all counsel of record.  
to Buckley  
Asst. Clerk

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 20-00855-D  
SJC 2020-0212

STEPHEN FOSTER, et. al,  
Plaintiffs,  
vs.

CAROL MICI, as Commissioner of Correction, et. al,  
Defendants.

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS'  
SECOND MOTION FOR PRELIMINARY INJUNCTION**

The plaintiffs, a class consisting of all prisoners held at Department of Correction (“DOC”) facilities, filed a second motion for preliminary injunction that would require DOC to make specific efforts to further reduce the prison population in light of the COVID-19 pandemic.<sup>1</sup> The defendants, Carol Mici in her official capacity as Commissioner of DOC (“Commissioner Mici”), Gloriann Maroney, in her official capacity as Chair of the Massachusetts Parole Board (“Parole Board”), and Thomas Turco, in his capacity as Secretary of the Executive Office of Public Safety and Security (collectively, “Defendants”) opposed the motion. The Court heard oral argument on February 10, 2021. For the below reasons, the motion is **DENIED**. However, plaintiffs may move on an expedited basis for leave of court to amend their Complaint to assert new claims under the line-item law enacted over the Governor’s veto on December 28, 2020 (the “December 2020 line-item law”).<sup>2</sup>

<sup>1</sup> The Supreme Judicial Court denied certain named plaintiffs’ first motion for a preliminary injunction on June 2, 2020. See *Foster v. Commissioner of Correction*, 484 Mass. 698 (2020) (“*Foster I*”). Thereafter, this Court certified a class of all prisoners housed in DOC facilities.

<sup>2</sup> See Chapter 227 of the Acts of 2020, Section 2, line item 8900-0001, available at <https://malegislature.gov/Budget/FY2021/FinalBudget>.

### **Procedural History of this Motion**

Plaintiffs filed the pending motion the evening of December 23, 2020. After allowing Defendants until January 22, 2021 to respond, a hearing was originally scheduled for January 27, 2021. On January 26, 2021, one day before the scheduled hearing, plaintiffs submitted a reply brief that made arguments for the first time based on the December 2020 line-item law. The Court set an expedited briefing schedule for Defendants to respond to plaintiffs' reply brief and for all parties to address additional issues raised by this Court, including the current status of the vaccination effort that had commenced at DOC facilities on January 18, 2021 and how that effort should affect the pending motion. Final submissions were made on February 9, 2021. The Court heard oral argument the next day.

### **Discussion**

#### **I. Legal Standard on Motion for Preliminary Injunction**

"A party seeking a preliminary injunction must show that success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party." *Doe v. Worcester Pub. Sch.*, 484 Mass. 598, 601 (2020) (quotation and citations omitted). "In cases in which a public entity is a party, a judge may also weigh the risk of harm to the public interest in considering whether to grant a preliminary injunction" *Id.* (citations omitted). "[T]he movant's likelihood of success is the touchstone of the preliminary injunction inquiry. [I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *Foster I*, 484 Mass. at 712, *quoting Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1<sup>st</sup> Cir. 2012) (additional citations omitted.)

## **II. Application of the Legal Standard**

In its ruling on plaintiffs' first motion for a preliminary injunction, the Supreme Judicial Court ("SJC") set forth in detail the standards for establishing an Eighth Amendment violation, and their particular applicability to lawsuits against prison officials. See *Foster I*, 484 Mass. at 716-724. For purposes of this motion, two of these standards are of paramount importance. First, an Eighth Amendment claim requires the proponent to establish both an objective element, i.e., that the inmates' living conditions "amount to a serious deprivation[ ] of basic human needs," *id.* at 717, quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), and a subjective element, i.e., "that prison officials acted or failed to act with deliberate indifference," *id.*, citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Second, the SJC has not held that art. 26 of the Massachusetts Declaration of Rights, which prohibits cruel and unusual punishment, provides greater protections with respect to conditions of confinement than does the Eighth Amendment. See *Foster I*, 484 Mass. at 716. This Court's analysis focuses primarily on DOC, the defendant that has custody of Massachusetts prisoners.

### **A. Department of Correction**

#### **1. Objective element of the Eighth Amendment claim.**

Although most DOC inmates have received a first dose of the Moderna COVID-19 vaccine, *see infra* at 5, 11, conditions inside DOC facilities continue to deprive inmates of basic needs and present a significant risk of serious harm. During the week of February 4, 2021 to February 10, 2021, there were 96 active COVID-19 cases among DOC inmates, eight of whom were hospitalized, and 50 active cases among DOC correction officers and other staff.<sup>3</sup>

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<sup>3</sup> See Special Master's Weekly Report (2/11/21) in *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, 484 Mass. 431 (2020) ("2/11/21 Special Master's Weekly Report"), available at <https://www.mass.gov/service-details/committee-for-public-counsel-services-v-chief-justice-of-the-trial-court-sjc-12926>.

Moreover, although prisoners are no longer in complete lockdown, measures to prevent the spread of COVID-19 continue to deprive them of pre-pandemic opportunities for recreation, work, education, and other activities. See *infra* at 5-6.

Due to the recent vaccination of inmates and staff discussed below, the Court cannot predict plaintiffs' ultimate likelihood of success on the objective element of their Eighth Amendment claim at a future trial. Further, and perhaps more to the point, plaintiffs' failure to show a likelihood of success on the subjective element of their claim (deliberate indifference by DOC officials) is dispositive of this motion. For these two reasons, the Court has not ruled in this Opinion on the objective element of plaintiffs' Eighth Amendment claim.

## **2. Subjective element of the Eighth Amendment claim.**

In denying plaintiffs' first motion for a preliminary injunction in *Foster I*, the SJC described those measures taken by DOC in the early stages of the pandemic that demonstrated the absence of deliberate indifference:

To combat the spread of COVID-19 as far as possible, the DOC has undertaken a number of measures, set forth in the appointed judge's findings of fact, many of which are stipulated to by the parties. These measures included lockdowns of the facilities; prohibiting all outside visitors; restrictions and self-examination on entry to any facility; isolation of symptomatic inmates and those who have tested positive; requiring staff to stay home for fourteen days if they have any symptoms; mandating that staff wear masks when in contact with inmates; distribution of additional cleaning supplies to all inmates; increased cleaning of frequently touched surfaces; making alcohol-based hand sanitizer available to inmates in numerous facilities; having inmates eat in their cells or housing units rather than at tables in larger groups; and instructions, posters, and information on COVID-19 and its spread, in both Spanish and English. To reduce inmates congregating in close contact with each other, the DOC has eliminated most group programming, work release, and academic and job skills classes, as well as outdoor recreation time and access to gyms and libraries, i.e., any activities where groups of inmates would be together. Over the course of this litigation, the DOC has obtained and distributed PPE to staff and, recently, all inmates. It has required that staff in contact with inmates, and all inmates who leave their cells or dormitories, wear masks at all times. The DOC also recently has instituted some

limited amount of outdoor time for all inmates, in small groups approximately every four days, so that physical distancing can be maintained.

484 Mass. at 721-722.

The January 22, 2021 and February 4, 2021 affidavits of Commissioner Mici establish that during the more than eight months since the SJC issued its decision in *Foster I*, DOC under her leadership has continued to act conscientiously in seeking to prevent COVID-19 infections and responding to them, continuing almost all of the above-noted actions and implementing updated policies and procedures. Actions that have continued include, but are not limited to, restrictions upon entry into DOC facilities while allowing attorney visits (1/22/21 Mici Aff. ¶¶ 17-20)<sup>4</sup>; mask wearing (*id.* ¶ 23); frequent testing including surveillance testing (*id.* ¶¶ 23, 25, 26); informing inmates and staff as to how to prevent infection (*id.* ¶ 25); cleaning and disinfection (*id.* ¶¶ 30-36, 39-41); social distancing (*id.* ¶¶ 37-38, 45), having inmates eat and get their medication in their cells or in small groups (*id.* ¶ 45), and isolation, tracking and treatment of inmates who test positive for COVID-19 or have COVID-19 symptoms (*id.* ¶¶ 56-75). DOC has refined and upgraded these procedures during the pandemic. *See id.* ¶¶ 30-36, 39-41.

More recently, DOC has educated inmates about the benefits of vaccination, and has offered a first dose of the Moderna COVID-19 vaccine to the 94% of all DOC inmates deemed eligible by DOC to receive the vaccine at the time, 71% of whom accepted it. *See* 2/4/21 Mici Aff. ¶¶ 1-6; *see also infra* at 11.

DOC has also modified to some extent the onerous conditions caused by restrictions on movement and social activity resulting from measures to prevent the spread of COVID-19. These modifications are significant because, as the SJC noted in *Foster I*, while the pandemic

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<sup>4</sup> “1/22/21 Mici Aff.” and “2/4/21 Mici Aff.” refer to the January 22, 2021 and February 4, 2021 affidavits of Commissioner Mici. “Plt. Br.” refers to plaintiffs’ brief in support of the pending motion. “DOC Opp. Br.” and “Parole Bd. Opp. Br.” refer respectively to the opposition briefs of defendants DOC and the Parole Board.



continues, the lockdown conditions instituted by DOC to prevent a serious risk of harm themselves risk becoming Eighth Amendment violations. 484 Mass. at 731. DOC ended the full lockdown, and has provided for outdoor time (1/22/21 Mici Aff. ¶¶ 45, 53), new opportunities to earn good time credit (*id.* ¶¶ 47, 51), the resumption of some industrial programs (*id.* ¶ 50), and expanded video access for inmates and their families and friends (*id.* ¶¶ 18-19).<sup>5</sup>

Commissioner Mici has taken personal responsibility for fighting the spread of and responding to COVID-19 infections inside DOC's facilities, as opposed to delegating leadership duties to her subordinates. *See, e.g.*, 1/22/21 Mici Aff. ¶¶ 15, 19, 22-23. In assessing whether DOC has acted with deliberate indifference to prison conditions during the pandemic, the Court places significant weight on Commissioner Mici's personal involvement.

In response to DOC's above-noted evidence of its actions to reduce the spread of COVID-19 inside its facilities and respond to infections, plaintiffs make two overarching arguments. First, plaintiffs argue that despite DOC's best intentions it has frequently failed to implement its policies and protocols, and has not prevented thousands of inmate COVID-19 infections and at least 19 inmate deaths. *See* Plt. Br. at 12-18; FTR recording of 2/10/21 hearing.<sup>6</sup> Second, plaintiffs argue that DOC has demonstrated deliberate indifference by refusing to employ numerous lawful means to reduce the inmate population, including furloughs, home

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<sup>5</sup> DOC cites a decrease in the number of inmate self-harm incidents and suicide attempts during the first nine months of the pandemic, measured against the same time period in 2019-2020, *see* 1/22/21 Mici Aff. ¶ 55, however plaintiffs cite credible evidence of lapses in DOC physical and mental health treatment, both before and during the pandemic, *see* Plt. Br. at 19-23, and supporting affidavits. The Court further notes that, in evaluating any decrease in adverse inmate events, one must consider the significant overall decrease in inmate population that has occurred during the pandemic. *See* 2/11/21 Special Master's Weekly Report.

<sup>6</sup> This Court agrees with plaintiffs that good intentions alone are not sufficient, i.e., that prison officials must implement tangible measures to address unsafe conditions and significant risks of serious harm. *See Farmer v. Brennan*, 511 U.S. 825, 829, 847 (1994); *Foster I*, 484 Mass. at 719-720.

confinement, medical and general parole, and maximizing the use of good time credit. *See id.* at 12-18. The Court rejects both arguments.

*Alleged lapses in DOC's actions and their consequences.*

To support their first argument, i.e., that DOC's efforts have failed, plaintiffs rely on extensive exhibits including, but not limited to, two expert affidavits, Plt. Br., Exhibits at 3-44, an affidavit of the Deputy General Counsel of CPCS's Public Defender Division, *id.* at 46-52, and 38 prisoner affidavits, *id.* at 55-180. Plaintiffs' exhibits combine individual incidents and overall statistics. Evidence of individual incidents supported by prisoner affidavits includes inmates being housed in dorms with nonfunctional sinks, showers and urinals, inmates with COVID-19 symptoms being housed in the general prison population, lapses in mask wearing, and delays in the provision of medical care, including mental health treatment. *See* Plt. Br. at 18-23, and supporting affidavits. Plaintiffs also cite the consequences of DOC's measures to combat the coronavirus, including reduced education, job training and rehabilitation programs, reduced access to recreation, religious services and libraries, and fewer visits by attorneys and family and friends. *See id.* at 23-26, and supporting affidavits. Further, it is undisputed that, even with the roughly 17% reduction in DOC inmate population that has occurred during the pandemic, inmates cannot keep a six-foot distance from each other at all times. As just one example, roughly half of all inmates do not sleep in single cells. *See* 1/22/21 Mici Aff. ¶83.

Although the Court has not made paragraph-by-paragraph credibility findings with regard to the inmate affidavits, the evidentiary record is clear enough for the Court to include that DOC has not achieved 100% compliance with its policies and procedures. The Court fully understands the consequences of any lapses in preventing the spread of a virus that has killed at

least 19 prison inmates and over 15,000 Massachusetts residents.<sup>7</sup> However, these lapses reflect sporadic mistakes and sporadic lack of sufficient attention to detail, which is far below the standard of deliberate indifference necessary to establish a constitutional violation. *See Estelle*, 429 U.S. at 105-106 (negligence not sufficient to establish constitutional violation).

Statistical evidence

With regard to the statistical evidence of DOC inmate infections and deaths, the parties emphasize the statistics that support their respective arguments. In broad terms, the statistical evidence reveals that the spread and control of COVID-19 inside DOC's facilities has closely paralleled the spread and control of COVID-19 throughout the Commonwealth.<sup>8</sup> In Spring 2020, COVID-19 cases spiked both throughout Massachusetts and inside DOC facilities. During the summer and early fall months, when COVID-19 infections and deaths declined throughout Massachusetts, COVID-19 infections almost disappeared from DOC facilities. Indeed, between June 1, 2020 and September 23, 2020, a period of almost four months, there were never more than three new inmate infections or three new staff infections in any week. There were also no inmate deaths due to COVID-19 between June 29, 2020, when this information was first reported, and December 2, 2020, a period of more than five months.

The second spike in COVID-19 infections and deaths in DOC facilities during the remainder of 2020 and early 2021 parallels a similar increase throughout Massachusetts and the United States. New COVID-19 infections inside DOC facilities and throughout the Commonwealth peaked in December 2020 and January 2021.

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<sup>7</sup> See 2/11/21 Special Master's Weekly Report; *COVID-19 Response Reporting*, available at <https://www.mass.gov/info-details/covid-19-response-reporting> (accessed Feb. 16, 2021).

<sup>8</sup> Compare 2/11/21 Special Master's Weekly Report with *COVID-19 Response Reporting*, *supra* at 8, n. 7.

The Executive Branch has prioritized the vaccination of prison and jail inmates. As of February 2, 2021, 94% of all members of the plaintiff class had been offered a first dose of the vaccine, and 71% of all class members who had been offered the vaccine had taken it. *See supra* at 5; *infra* at 11.

In sum, any shortcomings in the actions of DOC officials to combat the COVID-19 pandemic, and any adverse consequences of those actions or inactions, do not establish deliberate indifference by DOC.

*DOC's decision not to use certain programs for inmate reduction.*

Plaintiffs' second argument in their claim of deliberate indifference by DOC hinges on DOC's decision not to use certain programs to combat the spread of COVID-19 inside prisons by releasing inmates or speeding their release through certain programs. It is essentially undisputed that DOC has interpreted the applicable statutes and regulations as putting numerous limits on its ability to use home confinement, good-time credit and medical parole as methods of reducing the inmate population, and that DOC does not consider furloughs to be good policy. See 1/22/21 Mici Aff. ¶¶ 84-103. The flaw with plaintiffs' second argument is that they wrongly equate DOC's decision not to use certain *programs* with deliberate indifference to inmate *conditions* inside DOC's facilities. Deliberate indifference is the reckless disregard of "a substantial risk of harm," *Foster I*, 484 Mass. at 719, not the non-use of certain programs. The Eighth Amendment does not obligate prison officials to take all possible action available to address harms inside prisons. On the contrary, "[w]here the risk of harm is substantial, but prison officials have undertaken significant steps to try to reduce the harm and protect inmates, courts have concluded that there was no Eighth Amendment liability." *Foster*, 484 Mass. at 720 (footnote and additional citations omitted). DOC stands on firm ground in this regard, because its decisions

hinge on its interpretation of statutes and regulations. *See, e.g.,* 1/22/21 Mici Aff. ¶¶ 85-87; 89-103.

In sum, DOC's decision not to use furloughs, home confinement, medical and general parole or the maximum lawful use of good time credit as methods of inmate reduction does not establish deliberate indifference on its part.

### **B. Parole Board**

The Parole Board has a far more limited role than DOC has in addressing the effects of COVID-19 in the Commonwealth's prisons and jails because the Parole Board does not have custody of prison and jail inmates. *Cf. Pope v. Massachusetts Parole Board*, No. 20-P-1389 (Mass. App. Ct. Feb. 8, 2021) (Rule 1:28 opinion) (in rejecting plaintiff's Eighth Amendment claim, "the [Superior Court] judge rightly observed that, to the extent the plaintiff's current conditions of confinement form the basis for his demand for release, he should have named his custodian or the Department of Correction -- and not the board, who is not responsible for those conditions -- as the defendant in his civil action.") However, the SJC in *Foster v. Commissioner of Correction, et. al*, 484 Mass. 1059 (2020) (*Foster II*) ruled that plaintiffs' claim against the Parole Board survived a motion to dismiss. 484 Mass. at 1062-1063. Therefore, the Court must consider whether the Parole Board has shown deliberate indifference to conditions inside DOC's facilities.

Like DOC, the Parole Board argues that the applicable statutes and regulations limit the use of certain programs (here, parole) as a means of reducing the inmate population to combat COVID-19. *See* Parole Bd. Opp. Br at 4-11. Within its perceived legal limits, the Parole Board has made numerous adjustments in its operations during the pandemic, including but not limited to remote parole hearings, expediting certain types of hearings, and expanding living

arrangements for prospective parolees through contractual arrangements. *See id.* at 8, 12-14. The Parole Board also considers the impact of COVID-19 in individual parole decisions. *See* FTR recording of hearing on 2/10/21. These actions are sufficient to withstand a finding of deliberate indifference on the part of the Parole Board.

### **C. Vaccinations**

As of February 2, 2021, 94% of all DOC inmates had been offered a first dose of the Moderna COVID-19 vaccine, and 71% of those who had been offered the vaccine accepted it. *See supra* at 5. The remaining 6% of all inmates were not eligible to receive the vaccine, because they were currently infected with COVID-19, within 10 days of a positive test result, symptomatic, allergic to vaccine ingredients, pregnant or nursing, or had tested positive and received plasma within 90 days. *See* 2/4/21 Mici Aff. ¶ 6. Hopefully, vaccination of inmates and staff will lead to dramatically improved conditions inside Massachusetts prisons and jails, but this remains to be seen.<sup>9</sup>

### **D. The December 2020 Line-item Law**

On December 28, 2020, over Governor Baker's veto, the Legislature enacted a line-item law that imposed requirements on DOC during the COVID-19 pandemic. During oral argument on the pending motion, plaintiffs and DOC expressed dramatically different views of the law's import. *See* FTR recording of hearing on 2/10/21. This Court has accepted DOC's argument that statutes which have been in effect throughout the pandemic have limited its ability to use certain

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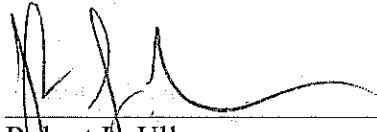
<sup>9</sup> In contrast to inmate vaccination rates, vaccination rates of DOC correction officers and other staff are currently shrouded in secrecy. DOC reports that only 49% of its employees who were offered the vaccine at DOC facilities accepted it there, but it does not know how many employees who refused the vaccine have accepted it as some other location. *See* FTR record of 2/10/21 hearing; Betancourt, *DOC accused of "deliberate indifference" to prisoners*, Commonwealth (February 10, 2021). DOC cites privacy concerns for its inability to ascertain overall vaccination rates of correction officers and staff. *Id.*

programs to decrease the inmate population. Plaintiffs should have an opportunity establish that the December 2020 line-item law changes this legal landscape and gives them a private cause of action. Therefore, plaintiffs may move on an expedited basis for leave of court to amend their Complaint to assert new claims under the law, as set forth below in the Conclusion and Order.

**Conclusion and Order**

Plaintiffs' Emergency Motion for Preliminary Injunction (Docket # 83) is **DENIED**. Plaintiffs may move on an expedited basis for leave of court to amend their Complaint to assert new claims under the line-item law enacted over Governor's Baker's veto on December 28, 2020. Upon the filing of any such motion, Defendants shall have eight court days to respond, and thereafter plaintiffs shall have four court days to file a reply of no more than 10 pages.

Dated: February 17, 2021



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Robert L. Ullmann  
Justice of the Superior Court